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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 208.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, APPELLANT,

vs.

JAMES K. KELLY AND AARON E. WAIT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED APRIL 6, 1880.

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No. 208.

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a In the circuit court of the United States for the district of Oregon. October term, 1877.

Be it remembered that on the 30th day of January, 1878, there was duly filed in the circuit court of the United States for the district of Oregon a transcript from the circuit court of the State of Oregon for the county of Wasco, in words and figures as follows, to wit:

1 *Complaint.*

In the circuit court of the State of Oregon for Wasco County. In equity.

JAMES K. KELLY AND AARON E. WAIT, plaintiffs,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

The above-named plaintiffs, complaining of the defendant, for cause of suit alleges:

That they, the said plaintiffs, are residents of the State of Oregon, and the defendant is a duly organized corporation under the laws of the State of New York.

That Winsor D. Bigelow, a white male citizen of the United States, was born in the State of Massachusetts in the year 1823. That he arrived in the Territory of Oregon in the year 1849, and was a resident
2 thereof (and of the State of Oregon) from the 27th day of September, 1850, until the 16th day of February, 1860. That on the first day of November, 1853, he was a white male settler upon the public lands of the United States, and on that day he personally commenced to reside upon and cultivate that part of the said public lands in Oregon designated in the surveys and plats of the United States as follows: Beginning at the northwest corner of the claim in section three (3), 48.92 chains west and 4.83 chains south of the corner of fractional sections 2 and 3, in township 1 N., R. 13 E. of the Willamette meridian; thence south 36.50 chains; thence east 16.25 chains; thence south 49.47 chains; thence west 71.02 chains; thence north 32° 30′ east 101.02 chains to the
3 place of beginning, containing three hundred and twenty acres. That the said Winsor D. Bigelow personally resided upon and cultivated the said described tract of land continuously from the said first day of November, 1853, to the 16th day of February, 1860; and within three months after the survey was made by the United States of the said land, the said Bigelow notified the register and receiver of the proper land office of the precise tract of land claimed by him, described as herein set forth, and on that day proved to the satisfaction of the register and receiver by two disinterested witnesses, as well as by the oath of the said W. D. Bigelow, that he personally resided upon and cultivated said described tract of land continuously from the 1st day of November, 1853, to the 16th day of February, 1860, and in all respects complied with the provisions of the act of Congress entitled "An act to create the office

of surveyor-general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September 27th, 1850, so as to entitle him to a donation of the said tract of land under and by virtue of the said act of Congress. And plaintiffs say that by virtue of the said settlement and cultivation and compliance with the terms of the said act of Congress the said W. D. Bigelow became and was the owner of the said described tract of land.

4 And the plaintiffs say that afterwards, to wit, on the 2d day of December, 1864, the said W. D. Bigelow, by deed duly executed and delivered, conveyed to the plaintiffs lots of ground in what is known as the Bluff addition to Dalles City, and being a part of the said donation land claim of the said W. D. Bigelow hereinbefore described, to wit:

Lot four in block one; lots one, two, three, eleven, twelve, and thirteen in block two; lot one in block three; lots eight and eleven in block five; lots six, nine, and twelve in block six; lots five, eight, and eleven in block seven; lots two, nine, and fifteen in block eight; lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve in block ten; lots one, two, and eight in block twelve; lots three, six, seven, and ten in block twenty-five; lots one, four, seven, and ten in block thirty; lots three, six, nine, and twelve in block thirty-one.

And plaintiffs further say that they are now the owners of the said lots of ground in the Bluff addition to Dalles City and that they are within the boundaries of a certain tract of land containing 643.37 acres, which the defendant claims to own in fee simple (except such portions as it has already sold), and for which a patent was issued by the United States to the defendant on the 9th day of July, 1875, and which is more particularly described as follows:

5 Beginning at the northeast corner of the claim in section 3, T. 1 N., R. 13 E., and on the left bank of the Columbia River at a set post; thence south 63.27 chains to a set post in section 3, for the SE. corner; thence west 80.00 chains to a set post in section 4, for the SW. corner; thence north 87.00 chains to a set post in section 33, T. 2 N., R. 13 E., for the NW. corner; thence east 45.19 chains to set post on the left bank of the Columbia River in section 34; thence, with the meanders of the river up stream, S. 47° E. 14.58 chains; thence S. 38° E. 4.00 chains; thence S. 70° E. 8.78 chains; thence S. 76½° E. 9.20 chains, to the place of beginning.

And the plaintiffs say that the said defendant claims to own the said described lots of ground in the Bluff addition to Dalles City under and by virtue of the second proviso in section one of the act of Congress entitled "An act to establish the territorial government of Oregon," approved the 14th day of August, 1848, which confirmed and established the title to the land, not exceeding six hundred and forty acres, then occupied as missionary stations among the Indian tribes in the Territory of Oregon, together with the improvements thereon, to the several religious societies to which said missionary stations respectively be-

6 longed. That the defendant claims to have established a missionary station on the said tract of land among the Indian tribes of that place, and occupied the same as such missionary station on the 14th day of

August, 1848, and for some years prior to that time; and that by virtue of such occupancy it was and is entitled to the said tract of land, for which it received a patent on the 7th day of July, 1875.

And plaintiff further says that about the year 1840 the said defendant established a missionary station on a portion of the said tract claimed by it, and occupied the same as a missionary station until about the month of September, 1847, and then abandoned and discontinued such occupancy, and never after that time occupied the said tract of land, or any portion thereof as a missionary station.

That such abandonment was made in pursuance of directions issued by the defendant to its missionaries in Oregon, to discontinue missionary labors in that territory east of the Cascade Mountains. And that there was no missionary station on the said tract, or any portion thereof, after the month of September, 1847. Yet the said defendant, notwithstanding the same was not occupied as such missionary station after the month of September, 1847, and did not belong to it, afterwards, to wit, about the year
7 1854, caused the said tract of 643.37 acres of land to be surveyed, and made a claim of title to it, under and by virtue of the provisions of the said act of Congress approved the 14th day of August, 1848. That afterwards, to wit, on the 30th day of March, 1854, the said missionary society, by its agent, Rev'd Thomas H. Pearne, filed a notification of its claim of title to the said tract of land with the surveyor-general of Oregon. That afterwards the Commissioner of the General Land authorized and empowered the surveyor-general of Oregon to hear and determine the conflict and controversy existing between the said Bigelow and the Missionary Society of the Methodist Episcopal Church, in pursuance of which authority the said surveyor-general notified the said parties, W. D. Bigelow and the said Missionary Society of the Methodist Episcopal Church, that on the 16th day of February, 1860, he would proceed to the hearing of the said controversy.

That from that day until some time in October of the same year, testimony was taken before the said surveyor-general, by the said missionary society to support the validity of its title to the said tract of land, and by the said Bigelow in opposition to its validity.

That after hearing the proofs and allegations of both of said parties, the said surveyor-general, on the 2d day of February, 1861, decided
8 that the said Missionary Society of the said Methodist Episcopal Church had no title whatever to the said tract of land, nor to any part of it.

That said missionary society appealed from said decision of the surveyor-general to the Commissioner of the General Land Office, who, after hearing the argument of counsel for the said parties, in the month of February, 1863, affirmed the said decision of the surveyor-general of Oregon. That said missionary society again appealed from the decision of the General Land Office to the Secretary of the Interior.

That after remaining undecided for many years, the Secretary of the Interior, on the 15th day of March, 1875, decided that the said Missionary Society of the Methodist Episcopal Church was entitled to the land in controversy, and on the 9th day of July, 1875, caused a patent to be issued therefor to the said Missionary Society of the Methodist Episcopal Church.

And plaintiffs say that the decision of the said Secretary of the Interior

was wrongful, unjust, and illegal, that it was made under a misapprehension and mistake of both the law and the facts in regard to the rights of the said Bigelow. That there was no evidence whatever before him showing or tending to prove that any portion of the said tract of land was
9 occupied as a missionary station by the Missionary Society of the Methodist Episcopal Church, after the month of September, 1847; but, on the contrary, all the evidence before the said Secretary showed that the said missionary station had been abandoned by the said missionary society in the month of September, 1847, and without any intention of being again occupied as a missionary station by the said missionary society. And plaintiffs say that the said Missionary Society of the Methodist Episcopal Church in violation of law, and in violation of the rights of the said W. D. Bigelow and of the plaintiffs in this suit.

(14th line, 13th page.) And the plaintiffs further say that the said defendant, the Missionary Society of the Methodist Episcopal Church, on the 14th day of August, 1848, occupied a tract of land as a missionary station near the town of Salem, in the Territory of Oregon, and claimed the title to the same, under the provisions of the said act of Congress approved August 14, 1848, and received a patent from the United States for the said tract of land containing 97.39 acres, situate in sections 23 and 26, in T. 7 S., R. 3 W., long before the 9th day of July, 1875, when the patent was issued for the land in controversy in this suit.

Wherefore plaintiffs pray that the court will adjudge and decree
10 that they are the owners of the said lot of ground in the Bluff addition to Dalles City, as numbered and described in this complaint, that the defendants holds the legal title to the said lots in trust for the plaintiff; and that the said defendant be decreed to make, execute, and deliver to the plaintiffs a deed of conveyance of all their right, title, and interest to the said lots, and for such other relief as the plaintiffs may be entitled to.

JAMES K. KELLY,
For Himself, and Solicitor for A. E. Wait the other Pl'ff.

STATE OF OREGON,
County of Multnomah, ss:

I, James K. Kelly, one of (5th line, 15th page) the plaintiffs in the within entitled suit, being duly sworn according to law, do say that I believe the foregoing complaint to be true.

JAMES K. KELLY.

Subscribed & sworn to before me this 29th day of August, 1877.
[NOTARIAL SEAL.] F. R. STRONG,
Notary Public for Oregon.

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk.
Filed Jan. 30th, 1878. R. H. Lamson, clerk.

11 *Summons.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY AND AARON E. WAIT, pl'ffs,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, def't.

To the Missionary Society of the Methodist Episcopal Church, defendant:

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above-entitled suit on or before the 12th day of November, 1877, that being the first day of the term of said court next following the publication of this summons for six weeks. If you fail to answer the said complaint, the plaintiffs will apply to the court for the relief prayed for therein, to wit, a decree declaring that they are the owners of certain lots of ground in Dalles City, Wasco County, claimed by you under an act of Congress approved August 14th, 1848, as a missionary station.

This summons is published by order of the Hon. L. L. McArthur, judge of said court.

12 Dated September 7th, 1877.

JAMES K. KELLY,
For Himself, and Att'y for Pl'ff A. E Wait.

STATE OF OREGON,
County of Wasco, ss:

I, James K. Kelly, being duly sworn, say, that on the 7th day of September, 1877, I put in the U. S. mail a copy of the complaint in the within entitled suit, certified by me to be a true copy; also a copy of the foregoing summons. That I directed the same to "The Missionary Society of the Methodist Episcopal Church, No. 805 Broadway, New York City, N. Y.," and fully paid the postage on the same at The Dalles, Oregon, p. o. and delivered the same to the postmaster.

JAMES K. KELLY.

Subscribed and sworn to before me this 7th day of September, A. D. 1877.

R. F. GIBONS, *Clerk.*

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

13 *Affidavit for publication of summons.*

In the circuit court of the State of Oregon for Wasco County.

JAMES K. KELLY AND AARON E. WAIT, plaintiffs,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

STATE OF OREGON,
County of Wasco, ss:

I, James K. Kelly, one of the above-named plaintiffs, being duly sworn,

do say that personal service of the summons in the above-entitled suit cannot be made upon the said defendant within the State of Oregon; and that said defendant, after due diligence, cannot be found within this State.

That this suit is brought against the said defendant to recover certain real property, situate in Wasco County, State of Oregon, which is claimed by the defendant; that a cause of suit exists in behalf of the plaintiffs and against the defendant for said real property, and the said defendant is a proper party to this suit.

I further say that the defendant is a foreign corporation, having
14 its office and place of business in the city and State of New York.

JAMES K. KELLY.

Subscribed and sworn to before me this 7th day of Sept., 1877.

L. L. McARTHUR, *Judge*.

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

15 *Order for publication of summons.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.

Based upon a proper application, duly made, it is hereby ordered that the summons herein be served upon the defendant by publication thereof once a week for six consecutive weeks in the Weekly Mountaineer, a newspaper published at The Dalles, Wasco Co., Oregon, and having a general circulation throughout the State. And it is further ordered that the pl'ffs cause to be forthwith deposited in the post-office at The Dalles, Wasco Co., O'g'n, a copy of the complaint and summons herein, carefully directed to the def't, at the office thereof, in New York City, N. Y., postage fully prepaid. And it is further ordered that during the publication of the said summons in the said newspaper the same be forwarded to the def't by mail, addressed to the office of def't, at New York City, N. Y., and fully prepaid as to postage.

Done and dated this the 7th day of Sept., 1877.

16 L. L. McARTHUR, *Judge*.

(Endorsed:) Filed September 7th, A. D. 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

17 *Demurrer to complaint.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY AND AARON E. WAIT, plaintiffs,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.
Demurrer.

Now comes the above named defendant, The Missionary Society of the

Methodist Episcopal Church, by its att'y, J. C. Cartwright, and demurs to the plaintiffs' complaint on file in the above entitled suit, and for grounds of demurrer allege:

That said complaint does not state facts sufficient to constitute a cause of suit.

J. C. CARTWRIGHT,
Att'y for Defendant.

(Endorsed:) Filed Nov. 12th, 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

18 *Petition for change of cause to U. S. circuit court.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY AND AARON E. WAIT, plaintiffs,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

Petition for removal of cause to the circuit court of the United States for the district of Oregon.

To the circuit court of the State of Oregon for the county of Wasco:

I. The petition of the defendant shows that suit has been brought against the petitioner in this court by the plaintiff above named.

II. That said suit is brought by the plaintiff to quite their pretended title to certain lands described in the complaint filed herein, and of which the defendant is the owner in fee simple, claiming title by grant from the United States and holding a patent from the United States therefor.

III. That the land in question consists of certain lots described and set forth in plaintiffs' complaint, within the corporate limits of Dalles City, in the county of Wasco, in the State and district of Oregon, and that the land so in dispute exceeds five hundred dollars in value, and is
19 of the value of, to wit, fifteen hundred dollars.

IV. That the petitioner is a corporation created by the laws of the State of New York and is doing business therein, with its principal office in New York City, and said corporation has not any agent within this State on whom process against it may be served according to the laws of this State.

V. That the November term, A. D. 1877, of the circuit court of the State of Oregon for the county of Wasco, is the term of said court at which the above-entitled suit could be first tried, and that there has been no trial thereof.

VI. That the petitioner hereby offers good and sufficient security for its entering, in the next circuit court of the United States for the district of Oregon, on the first day of its next session, a copy of the record in the above-entitled suit, and also for then appearing and entering special bail in the suit if special bail were originally requisite therein according to the law and practice of the United States and its courts.

Your petitioner therefore asks that the said cause may be removed for trial into the next circuit court of the United States for the district of Oregon, to be held at Portland, in said district, pursuant to the provisions of the said statutes of the United States in such case made and provided, and that this court do accept the surety offered by your petitioner
20 as aforesaid, and do proceed no further in the said cause, and for such further order or relief in the premises as may be just.

J. C. CARTWRIGHT,
Agent & Att'y for the Defendant.

STATE OF OREGON,
County of Wasco, ss:

I, J. C. Cartwright, being duly sworn, say I am agent and attorney for the defendant above named, the petitioner herein, and that the foregoing petition is true, as I verily believe. That the reason this affidavit is not made by the petitioner is that said petitioner is a corporation not within this county and is not capable of making the same.

J. C. CARTWRIGHT.

Subscribed and sworn to before me this 12th day of November, A. D. 1877.

R. F. GIBONS, *Clerk.*

(Endorsed:) Filed Nov. 12th, 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

21 *Bond.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY & AARON E. WAIT, plaintiffs,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendants

Bond for removal of this cause to the United States circuit court.

Know all men by these presents that we, William Helm and Joseph Beezley, of Wasco County, Oregon, are held and firmly bound unto James K. Kelly and Aaron E. Wait, plaintiffs in the above entitled suit, their executors, administrators, and assigns, in the sum of two hundred dollars, lawful money of the United States, to be paid to the said James K. Kelly and Aaron E. Wait, their executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, and every of them forever, by these presents. Sealed with our seals and dated the 12th day of November, A. D. 1877.

Whereas the above-named James K. Kelly and Aaron E. Wait
22 have commenced a suit in the circuit court of the State of Oregon for the county of Wasco, against the above-named defendant, The Missionary Society of the Methodist Episcopal Church, and that at the

term of said court at which said suit could be first tried, and before the trial thereof, the said defendant has filed its petition for the removal of the cause into the next circuit court of the United States for the district of Oregon, to be held at Portland, in said district:

Now therefore, the condition of the above obligation is such that if the said Missionary Society of the Methodist Episcopal Church, the defendant in said suit, shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall also then and there appear and enter special bail in the cause, if special was originally requisite therein, according to the law and practice of the United States and its courts, and shall pay all costs that may be awarded by the said circuit court if the said court shall hold that said suit was wrongfully or improperly removed thereto, then these presents shall be void, or otherwise to remain in full force.

WILLIAM HELM. [SEAL.]
JOSEPH BEEZLEY. [SEAL.]

In presence of—
J. C. CARTWRIGHT.
R. F. GIBONS.

23 STATE OF OREGON,
County of Wasco, ss:

I, Wm. Helm, being first duly sworn, say that I am neither a counsellor nor attorney at law, sheriff, clerk of any court, or other officer of any court, and I am a resident and householder within the State of Oregon, and I am worth four hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

WM. HELM.

Subscribed and sworn to before me this 12th day of Nov., A. D. 1877.
R. F. GIBONS,
County Clerk.

STATE OF OREGON,
County of Wasco, ss:

I, Joseph Beezley, being first duly sworn, say that I am neither a counsellor nor attorney at law, sheriff, clerk of any court, or other officer of any court, and I am a resident and householder within the State of Oregon, and I am worth four hundred dollars over and above all debts and liabilities, exclusive of property exempt from execution.

JOSEPH BEEZLEY.

Subscribed and sworn to before me this 12th day of Nov., A. D. 1877.
R. F. GIBONS, *Clerk.*

(Endorsed:) Filed Nov. 12th, 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

24 *Affidavit of printer of publication of summons.*

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY & AARON E. WAIT, PL'FFS,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, def'ts.

STATE OF OREGON,
County of Wasco:

I, William M. Hand, being duly sworn according to law, do say that I am the printer of the Mountaineer, a weekly newspaper published at Dalles City, in the county of Wasco, Oregon; that the summons in the above-entitled cause, a copy of which is hereto annexed, was published in said newspaper for six consecutive weeks, commencing on the 8th day of September, 1877, and that during the publication of the said summons in said newspaper, a copy of the same newspaper was forwarded by mail, addressed to the defendant, at its office, No. 805 Broadway, New York City, N. Y.

WILLIAM M. HAND.

25 Subscribed and sworn to before me this 13th day of Nov., 1877.
R. F. GIBONS, *Clerk.*

Summons.

In the circuit court of the State of Oregon for the county of Wasco.

JAMES K. KELLY, AARON E. WAIT, PLAINTIFFS,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

To the Missionary Society of the Methodist Episcopal Church, defendant:

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above-entitled suit on or before the 12th day of November, 1877, that day being the first day of the term of said court next following the publication of this summons for six weeks. If you fail to answer said complaint the plaintiff will apply to the court for the relief prayed for therein, to wit, a decree declaring that they are the owners of certain lots of ground in Dalles City, being a portion of a tract of land claimed by you in Wasco County, under an act of Congress approved August 14th, 1848, as a missionary station.

26 This summons is published by order of Hon. L. L. McArthur, judge of said court.

Dated the 7th day of September, 1877.

JAMES K. KELLY,
For Himself, and Attorney for A. E. Wait.

(Endorsed:) Filed Nov. 13th, 1877. R. F. Gibons, clerk. Filed January 30, 1878. R. H. Lamson, clerk.

27 *Journal entry.*

At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco, begun and held at the court-house in Dalles City, on Monday, the 12th day of November, A. D. 1877, at ten o'clock a. m., at which were present the following officers, viz: Hon. L. L. McArthur, judge; L. B. Ison, dist. att'y; J. B. Crossen, sheriff, and R. F. Gibons, clerk. And among other, the following proceeding was had on Tuesday, Nov'r 13th, A. D. 1877, the same being the second judicial day of said term, to wit:

JAMES K. KELLY AND AARON E. WAITE
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.

Now, on this day this cause came on to be heard upon the defendant's petition for change of cause to the United States circuit court, the plaintiffs appearing by James K. Kelly, of counsel, and the defendant by J. C. Cartwright, of counsel. The same was submitted without argument,
28 and it appearing that the matters in dispute herein exceed, exclusive of costs, the sum of $500, and that said defendant is a corporation doing business in the State of New York, having its principal office in said State, and it further appearing that a good and sufficient bond in the sum of $200 has been filed herein, and after due consideration by the court it is ordered that said petition be granted, and that the place of trial of this cause be changed to the United States circuit court to be holden at Portland, Oregon, at its next regular session; and it is further ordered that a transcript of the proceedings herein be forthwith transmitted to the clerk of said court.

(Signed) L. L. McARTHUR, *Judge.*

STATE OF OREGON,
County of Wasco, ss:

I, R. F. Gibons, county clerk in and for said Wasco County, and ex officio clerk of the circuit court of the State of Oregon for the county of Wasco, do hereby certify that I have compared the foregoing with the original entry in the journal of said court, and that it is a true and correct transcript therefrom and of the whole of such original, as the same
29 appears of record at my office and in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 28th day of January, A. D. 1878.

SEAL OF CIRCUIT COURT, WASCO COUNTY, OREGON.

R. F. GIBONS, *Clerk.*

(Endorsed:) Filed January 30, 1878. R. H. Lamson, clerk.

30 *Order.*

And afterwards, to wit, on Monday, the 8th day of April, 1878, the same being the 1st judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE M. E. Church.
No. 392. April 8, 1878.

Now, at this day comes the plaintiffs by Mr. James K. Kelly, their attorney, and the defendant by Mr. Rufus Mallory and Mr. J. C. Cartwright, its attorneys, and on motion of said defendant it is ordered that said defendant have leave to amend its demurrer filed herein, and that said demurrer be set for hearing to-morrow, April 9th, 1878.

30½ And afterwards, to wit, on the 9th day of July, 1880, there was duly filed in said court a demurrer to complaint, in words and figures as follows, to wit:

31 *Demurrer to complaint.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY ET AL., PLAINTIFF,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

Now comes the said defendant and demurs to the complaint filed in this cause for the reason that the same does not state facts sufficient to constitute a cause of suit.

And defendant demurs specially to that part of said complaint, commencing at the word "and" on the 14th line of the 13th page, to and including the word "suit" on the 5th line of the 15th page thereof, for the reason that the issuance of a patent to the defendant to the land therein referred to and described cannot furnish any cause of suit to the plaintiff to quiet title to lands in Dalles City, and because the issuance of a patent to the defendants to the portion of said complaint referred to would in no way effect the right of the defendant to the land in Dalles City.

J. C. CARTWRIGHT,
RUFUS MALLORY,
Att'y for Defendant.

(Endorsed:) Filed April 9th, 1878. R. H. Lamson, clerk.

32 *Order.*

And afterwards, to wit, on Tuesday, the 9th day of April, 1878, the same being the 2nd judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE M. E. Church.
No. 392. April 9th, 1878.

Now, at this day comes the plaintiffs by Mr. James K. Kelley and

Mr. William Strong, and the defendant by Mr. Rufus Mallory and John C. Cartwright, and this cause comes on to be heard on the demurrer to the complaint herein, and was argued by counsel and taken under advisement by the court.

32½ And afterwards, to wit, on Wednesday, the 17th day of April, 1878, the same being the 5th judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

33 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.
No. 392. April 17th, 1878.

Now at this day comes the plaintiff by Messrs. James K. Kelly and William Strong, and the defendant by Messrs. Rufus Mallory and John C. Cartwright, and the court having heard the argument of counsel upon the demurrers to the complaint herein, and duly considered the same, it is ordered that said demurrers, both general and special, be, and the same are hereby, overruled, with leave to the defendant to set up and insist upon the same matters in his answer on final hearing.

And the plaintiffs are hereby required and directed to restate their case in the form of a bill in equity, and to serve a copy thereof upon the defendant or its attorney within thirty days.

(Signed) DEADY, *J.*

(Endorsed:) Filed April 17th, 1878. R. H. Lamson, clerk.

33½ And afterwards, to wit, on the 2nd day of May, 1878, there was duly filed in said court a bill in equity in words and figures as follows, to wit:

34 *Bill in equity.*

To the judges of the circuit court of the United States for the district of Oregon:

James K. Kelly, of the county of Multnomah, and Aaron E. Wait, of the county of Clackamas, and citizens of the State of Oregon, bring this their bill against The Missionary Society of the Methodist Episcopal Church, a duly organized corporation under the laws of New York, having its office or principal place of business in the city of New York, in that State.

And thereupon your orators complain and say that Winsor D. Bigelow, a white male citizen of the United States, was born in the State of Massachusetts in the year 1823, and arrived in the Territory of Oregon in the year 1849; that he was a resident in the Territory and State of Oregon from that time until the 16th day of February, 1860. That on the 1st day

of November, 1853, he was a white male settler upon the public lands of the United States, and on that day he personally commenced to reside upon and cultivate that part of the said public lands in Oregon designated in the surveys and plats of the United States as follows: Beginning at the
35 northwest corner of the claim in section three (3), 48.92 chains west and 4.83 chains south of the corner of fractional sections 2 and 3, in township 1 north of range 13 east of the Wallamette meridian; thence south 36.50 chains; thence east 16.25 chains; thence south 49.47 chains; thence west 71.02 chains; thence north 32° 30′ east 101.82 chains, to the place of beginning, containing three hundred and twenty acres. That the said Winsor D. Bigelow personally resided upon and cultivated the said described tract of land continuously from the said 1st day of November, 1853, to the 16th day of February, 1860, and during such residence he was a single man. That the survey was made by the United States of the said public lands, and such survey approved on the 4th day of February, 1860, and within three months thereafter, to wit, on the 16th day of February, 1860, the said W. D. Bigelow notified the register and receiver of the proper land office of the precise tract of land claimed by him, described as hereinbefore set forth; and on that day proved to the satisfaction of the said register and receiver by two disinterested witnesses, as well as by his own oath, that he personally resided upon and cultivated the said described tract of land continuously from the 1st day of November, 1853, to the 16th day of February, 1860, and in all respects complied with the provisions of the
36 act of Congress entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," approved September 27, 1850, so as to entitle him to a donation of the said tract of land under and by virtue of the said act of Congress; and that on account of a claim of title to a portion of the said described tract of land by The Missionary Society of the Methodist Episcopal Church, the defendant in this suit, the said register and receiver of the land office declined to give a certificate of such continued residence and cultivation until the controversy between the said claimants should be decided by the land department.

And your orators say that by virtue of the said settlement and cultivation, and compliance with the terms of the said act of Congress, the said Winsor D. Bigelow became and was the owner of the said described tract of land.

And your orators say that afterwards, to wit, on the 2d day of December, 1864, the said W. D. Bigelow, by deed duly executed and delivered, conveyed to your orators in fee simple the following lots of ground in what is known as the "Bluff addition to Dalles City," the same being a part of the said donation land claim of the said W. D. Bigelow hereinbefore described, to wit: Lot four in block one; lots one, two, three, eleven,
37 twelve, and thirteen in block two; lot one in block three; lots eight and eleven in block five; lots six, nine, and twelve in block seven; lots two, nine, and fifteen in block eight; lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve in block ten; lots one, two, and eight in block twelve; lots three, six, seven, and ten in block twenty-five; lots one, four, seven, and ten in block thirty; lots three, six, nine, and twelve in block thirty-one.

And your orators further say that they are now the owners of the said described lots of ground in fee simple.

And your orators further say that the said described lots of ground are within the boundaries of a certain tract of land containing 643.37 acres, which the defendant in this suit claims to own in fee simple (except such portions thereof as it has sold), and for which a patent was issued by the United States to the said defendant on the 9th day of July, 1875, and which is more particularly described as follows:

Beginning at the NE. corner of the claim in section 3, T. 1 N., R. 13 E., and on the left bank of the Columbia River at a set post; thence south 63.27 chains to a set post in section 3 for the SE. corner; thence west 80.00 chains to a set post in section 4 for the southwest corner; thence north 87.00 chains to a set post in section 33, T. 2 N., R.13 E.,
38 for the northwest corner; thence east 45.19 chains to a set post on the left bank of the Columbia River in sec. 34; thence, with the meanders of the river up stream, S. 47° E. 14.58 chains; thence S. 38° E. 4.00 chains; thence S. 70° E. 8.78 chains; thence S. 76½° E. 9.20 chains, to the place of beginning.

And your orators say that the defendant claims to own the said described lots of ground in the Bluff addition to Dalles City, under and by virtue of the second proviso in section one of the act of Congress entitled "An act to establish the territorial government of Oregon," approved August 14, 1848, which confirmed and established the title to the land, not exceeding six hundred and forty acres, then occupied as missionary stations among the Indian tribes in the Territory of Oregon, together with the improvements thereon, to the several religious societies to which said missionary stations respectively belonged. That the said defendant claims to have established a missionary station on the said tract of land among the Indian tribes at that place, and occupied the same as such missionary station on the 14th day of August, 1848, and for some years prior thereto, and that by virtue of such occupancy it was and is entitled to the said tract of land, for which it received a patent on the 9th day of July, 1875.

39 And your orators further say that about the year 1840 the said defendant established a missionary station on a portion of the said tract of land claimed by it, and occupied the same as a missionary station until about the day of September, 1847, and then intentionally abandoned and discontinued such occupancy, and never after that time occupied the said tract of land, or any portion thereof, as a missionary station. That such abandonment was made in pursuance of directions issued by the said defendant to its missionaries in Oregon to discontinue missionary labors in that Territory east of the Cascade Mountains.

And your orators say that there was no missionary station on the said tract, or any portion thereof, on or after the month of September, 1847. Yet the said defendant, notwithstanding the same was not occupied as such missionary station after the month of September, 1847, and did not belong to it, afterwards, to wit, about the year 1854, caused the said tract of 643.37 acres of land to be surveyed and made a claim of title to it under and by virtue of the provisions of the said act of Congress approved August 14, 1848. That afterwards, to wit, on the 30th day of March, 1854, the said defendant, by its agent, Rev'd Thomas H. Pearne, filed a notification of its claim of title to the said tract of land in the of-
40 fice of the surveyor-general of Oregon. That afterwards the Commissioner of the General Land Office authorized and empow-

ered the surveyor-general of Oregon to hear and determine the conflict and controversy existing between the said W. D. Bigelow and the Missionary Society of the Methodist Episcopal Church, the defendant, in pursuance of which authority the said surveyor-general of Oregon notified the said parties that on the 16th day of February, 1860, he would proceed to the hearing of the said controversy. That from that day until some time in the month of October of the same year testimony was taken before said surveyor-general by the defendant to support the validity of its title to the said tract of land, and by the said W. D. Bigelow in opposition to its validity; that after hearing the proofs and allegations of both of said parties the said surveyor-general, on the 2d day of February, 1861, decided that the said defendant had no title whatever to the said tract of land, or to any part of it; that said defendant appealed from said decision of the surveyor-general to the Commissioner of the General Land Office, who, after hearing the argument of counsel for the said parties, in the month of February, 1863, affirmed the said decision of the surveyor-general of Oregon; that said defendant again appealed from the decision of the
41 Commissioner of the General Land Office to the Secretary of the Interior; that after remaining undecided for many years the Secretary of the Interior on the 15th day of March, 1875, decided that the said defendant was entitled to the land in controversy, and on the 9th day of July, 1875, caused a patent to be issued therefor to the Missionary Society of the Methodist Episcopal Church, the defendant.

And your orators say the said decision of the Secretary of the Interior was wrongful, unjust, and illegal; that it was made under a mistake and misapprehension, both of the law and the facts, in regard to the rights of the said W. D. Bigelow; that there was no evidence whatever before him showing, or tending to prove, that any portion of the said tract of land was occupied as a missionary station by the defendant after the month of September, 1847, but, on the contrary, all the evidence before the said Secretary of the Interior showed that the said missionary station had been abandoned by the defendant in the month of Septemer, 1847, and without any intention of again being occupied as a missionary station by the defendant. And your orators say that the said defendant , in violation of law, and in violation of the rights of the said W. B. Bigelow and of your orators.

And your orators further say that the said defendant, the Mis-
42 sionary Society of the Methodist Episcopal Church, on the 14th day of August, 1848, occupied a tract of land as a missionary station near the town of Salem; that on the 30th day of April, 1853, the said defendant, by Thomas H. Pearne, its agent and attorney, filed in the office of the register of the land office at Oregon City a notification of its claim to the said tract of land containing 97.39 acres, situate in sections 23 and 26, in T. 1 S., R. 3 W., and that it was entitled to the same under and by virtue of the provisions of the said act of Congress approved August 14, 1848; that afterwards the Commissioner of the General Land Office directed the surveyor-general of Oregon to determine the validity and extent of the said claim; and that said surveyor-general in the year 1861, decided that the said defendant was so entitled under the said act of Congress to the said tract of land containing 97.39 acres; which decision was afterwards affirmed by the Commissioner of the General Land Office,

since which time the title of the said defendant to the said tract of land has been acknowledged by the United States and unquestioned by any one. And your orators deny the right of the said defendant to another tract of land under the said act of Congress, approved Aug. 14, 1848.

In consideration whereof and forasmuch as your orators are without adequate remedy, save in a court of equity, your orators pray that
43 the defendant, having appeared in this court, may be required to answer upon oath all and singular the matters and things hereinbefore set forth and complained of, and especially to answer and set forth:

1st. Whether the Missionary Society of the Methodist Episcopal Church did not some time prior to the month of September, 1847, through its agents, direct its missionaries in Oregon to discontinue missionary operations at the Dalles?

2d. Whether it did not, through its agents, in or about the month of September, 1847, sell and dispose of its missionary station at the Dalles to Dr. Marcus Whitman?

3d. Whether it was on the 14th day of August, 1848, occupying the said tract of land, or any part thereof, as a missionary station?

And your orators pray that this honorable court, upon the final hearing of this cause, will adjudge and decree that they are the owners of the said lots of ground in the Bluff addition to Dalles City as numbered and described in this bill; that the defendant holds the legal title to the said lots in trust for your orators; and that the defendant be decreed to make, execute, and deliver to your orators a deed of conveyance of all its right, title, and interest to said lots, and for such other relief as they may
44 be entitled to in a court of equity.

JAMES K. KELLY,
For Himself & Solicitor for A. E. Wait.

STATE OF OREGON,
County of Multnomah:

I, James K. Kelly, one of the complainants within, being duly sworn do say that I believe the foregoing bill to be true.

JAMES K. KELLY.

Subscribed and sworn to this 2d day of May, 1878.

R. H. LAMSON,
Clerk U. S. Comm'r.

(Endorsed:) Filed May 2d, 1878. R. H. Lamson, clerk.

44½ And afterwards, to wit, on the 27th day of June, 1878, there was duly filed in said court a motion to strike out part of bill, in words and figures as follows, to wit:

45 *Motion to strike out part of bill.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.

Comes now the said defendant by its solicitors and moves the court to

strike out of the complainants' bill the following words, to wit: 1st. Beginning at the word "and" in the 19th line of the eleventh page of said bill and extending to and including the word "orators" in the 17th line of the 12th page, for the reason that the same is immaterial and irrelevant. 2d. Strike out the following words for the same reason: Beginning at the word "and" in the 18th line of the 12th page and extending to and including the word "one" in the 24th line of the 13th page. 3d. Strike out all the following words for the same reason: Beginning at the word "and" in the 24th line of the 13th page and extending to and
46 including the figures "1848" in the 2d line of the 14th page.

J. C. CARTWRIGHT AND
RUFUS MALLORY,
Solicitors for Defendant.

(Endorsed:) Filed June 27, 1878. R. H. Lamson, clerk.

46½ And afterwards, to wit, on Monday, July 8th, 1878, the same being the 35th judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

47 *Order.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES K. KELLY AND AARON E. WAITE
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.
} No. 392. July 8th, 1878.

Now, at this day come the complainant by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and the motion filed herein to strike out parts of the amended bill being submitted without argument, it is ordered that said motion be, and the same is hereby, denied, with leave to defendant to file exceptions to said amended bill.

(Signed) DEADY, *J.*

(Endorsed:) Filed July 8th, 1878. R. H. Lamson, clerk.

47½ And afterwards, to wit, on the 9th day of July, 1878, there was duly filed in said court exceptions to part of complainants' bill in words and figures as follows, to wit:

48 *Exceptions to parts of complainants' bill.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.
}

The defendant comes now and excepts to all those parts of the complain-

ants' bill hereinafter specified upon the grounds and for the reason that the same and each of them are irrelevant and impertinent, viz:

1st. Beginning at the word "and" in the 19th line of the 11th page of said complainants' bill and extending to and including the word "orators" in the 17th line of the 12th page.

2d. Beginning at the word "and" in the 18th line of the 12th page and extending to and including the word "one" in the 24th line of the 13th page.

3d. Beginning at the word "and" in the 24th line of the 13th page and extending to and including the figures "1848" in the 2d line of the 14th page.

Defendant says the said parts of said complainants' bill, and each
49 and every of them, are irrelevant and impertinent, and it therefore excepts thereto.

J. C. CARTWRIGHT &
RUFUS MALLORY,
Solicitors for Defendant.

(Endorsed:) Filed July 9, 1878. R. H. Lamson, clerk.

50 *Order.*

And afterwards, to wit, on Monday, the 15th day of July, 1878, the same being the 36th judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE M. E. Church.
No. 392. July 15th, 1878.

Now, at this day, come the plaintiff, by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and this cause comes to be heard on the exceptions filed to the bill herein, and the court having heard the argument of counsel, will advise thereof.

50½ And afterwards, to wit, on Saturday, July 27th, 1878, the same being the 42d judicial day of the regular April term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

51 *Order disallowing exceptions.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.
No. 392. July 27, 1878.

Now at this day come the complainant by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and this

cause having been heretofore heard on the exceptions filed to the bill herein and argued by counsel and taken under advisement by the court, and now at this day the court being fully advised in the premises, it is ordered that said exceptions be, and they are hereby, disallowed, and that defendant have two weeks in which to answer the bill of complaint herein.

(Signed) DEADY, *J.*

(Endorsed:) Filed and entered July 27, 1878. R. H. Lamson, clerk.

51½ And afterwards, to wit, on the 12th day of August, 1878, there was duly filed in said court an answer in words and figures as follows, to wit:

52 *Answer.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT, complainants,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

To the judges of the circuit court of the United States for the district of Oregon:

This defendant, now and at all times hereafter saving and reserving to itself all benefit and advantages of exceptions which can or may be taken to the many errors, uncertainties, and imperfections in said bill of complaint contained, for answer thereto, or so much thereof as this defendant is advised is or are material or necessary for it to answer, answering, says:

It has no knowledge as to whether Windsor D. Bigelow, named in complainants' bill, is a white male citizen of the United States, or whether he was born in the State of Massachusetts in the year 1823, or whether he arrived in the Territory of Oregon in the year 1849, and so cannot
53 admit that the said allegations are true, but it does not deny the same, but defendant denies any knowledge or information sufficient to form a belief as to whether, on the 1st day of November, 1853, he was a settler upon the public lands of the United States, or whether on that day he commenced to reside upon and cultivate that part of the said public lands in Oregon designated in the surveys and plats of the United States which is described in complainants' bill. Denies any knowledge or information sufficient to form a belief as to the said W. D. Bigelow personally resided upon and cultivated the said described tract of land continuously from the said 1st day of November, A. D. 1853, to the 16th day of February, 1860, or as to whether during such residence, if he did reside thereon, he was a single man.

Defendant admits that the survey was made by the United States of said public lands, and such survey was approved on the 4th day of February, 1860, but defendant does not admit and it does not deny that within three months after the said 4th day of February, 1860, the said W. D. Bigelow notified the register and receiver of the proper land office of the

precise tract of land claimed by him and described as in complainants' bill set forth, and defendant will not admit nor deny that on the 16th day of February, 1860, he proved, to the satisfaction of the register and receiver by two disinterested witnesses as well as by his own oath, that he had
54 permanently resided on and cultivated the said described tract of land continuously from the 1st day of November, 1853, to the 16th day of February, 1860, but defendant denies that the said W. D. Bigelow did in all respects comply with the provisions of the act of Congress referred to in complainants' bill, approved September 27th, 1850, so as to entitle him to a donation of said tract of land under and by virtue of said act of Congress.

And defendant denies any knowledge or information sufficient to form a belief as to whether, on account of a claim of title to a portion of said described tract of land by the Missionary Society of the Methodist Episcopal Church (this defendant), the said register and receiver declined to give a certificate of such continued residence and cultivation until the controversy between the said claimants should be decided by the land department.

And defendant denies that by virtue of such residence and cultivation, and compliance with the terms of said act of Congress, the said W. D. Bigelow became or was the owner of the said described tract of land.

And defendant denies that on the 2d day of December, 1864, or at any other time the said W. D. Bigelow conveyed to the complainants the land or any part thereof described in the complainants' bill of complaint.

Defendant denies that the complainants are now the owners of the said lots of ground in the Bluff addition to Dalles City, and described in the complainants' bill of complaint.

55 Defendant admits that the said lots of ground described in the complainants' bill of complaint is embraced within the boundaries of a certain tract of land containing 643.37 acres, which the defendant claims to own and does own (except such portions thereof as it has already sold), and for which a patent was issued by the United States to defendant on the 9th day of July, 1875, and which is particularly described in the complainants' bill.

And defendant admits that it claims to own the said tract of land, including the said lots of ground in the Bluff addition to Dalles City described in the complainants' bill of complaint, under and by virtue of the second proviso of section one of the act of Congress entitled "An act to establish the Territorial government of Oregon," approved August 14th, 1848.

And defendant admits that it claims to have established a missionary station on the said tract of land among the Indian tribes at that place, and to have occupied the same as such missionary station within the meaning of the said act of Congress approved August 14th, 1848, on the said 14th day of August, 1848, and for some years prior thereto; and by virtue of such occupancy it was and is entitled to said land, and for which it received a patent, which was dated 9th day of July, 1875.

Defendant further says that prior to the year 1840, that is to
56 say, about the year 1836, it established a missionary station upon the said tract and claimed the same for that purpose, and occupied

the same for the various purposes of said mission continuously until about the month of September, 1847, but defendant denies that it then intentionally abandoned and discontinued such occupancy, and never after that time occupied the said tract of land or any portion thereof as a missionary station.

And defendant says that said 643.37 acres of land were occupied as a missionary station by its agents and missionaries, and by others with its permission, from the time the same was first founded until long after the said 14th day of August, 1848, except during such portion of said time as a condition of Indian hostilities *and was* in that section of country made it unsafe, injudicious, and impracticable, as will hereafter appear.

Defendant denies that said alleged and pretended abandonment was made in pursuance to an order made by itself to its missionaries in Oregon, directing them to discontinue missionary labor and operations east of the Cascade Mountains.

Defendant denies that it had abandoned and discontinued missionary labors in 1847, as alleged in said bill of complaint.

And denies that about the year 1854 it caused the said tract of 643.37 acres of land to be surveyed, but says and admits that formal noti-
57 fication of its claim to said tract of 643.37 acres was filed in the office of the surveyor-general of Oregon in the year 1854, by Rev. Thos. H. Pearne, its agent.

Defendant admits that proceedings had in the land department of the government, as alleged in complainants' bill, but it denies that the decision of the Secretary of the Interior as finally rendered in said controversy was wrongful, unjust, or illegal; and denies that it was made under a misapprehension or mistake of either law or fact in regard to the rights of the complainants or of the said W. D. Bigelow.

Denies that there was no evidence whatever before the said Secretary of the Interior showing or tending to prove that any portion of the said tract of 643.37 acres of land were occupied as a missionary station by the defendant after the month of September, 1847; and defendant denies that all the evidence before the said secretary showed that defendant had abandoned said missionary station in the month of September, 1847, without any intention to again occupy the same as a missionary station.

And the defendant denies that the said patent was issued to it in violation of the rights of the said Bigelow or of the rights of the complainants.

Defendant denies that on the 14th day of August, 1848, it occupied a tract of land as a missionary station near the town of Salem, in Oregon Territory; but says it was in possession of a tract of land
58 near Salem aforesaid, which its agent, Rev. Thomas H. Pearne, on the 30th day of April, 1853, claimed under the said second proviso of the first section of the said act of Congress approved August 14th, 1848; and that the said Thos. H. Pearne, on the 30th day of April, 1853, filed in the office of the register of the land office at Oregon City a notification of the claim of the defendant to a tract of land containing 97.37 acres, situated in section 23 & 26, T. 7 S., R. 3 W.

Defendant denies any knowledge or information sufficient to form a belief as to whether afterwards, or at any time, the Commissioner of the

General Land Office directed the surveyor-general of Oregon to determine the validity of the said claim, or as to whether the said surveyor-general in the year 1861, or at any other time, decided that the defendant was entitled to said tract of land under the said act of Congress approved August 14th, 1848, or whether said pretended decision was affirmed by the Commissioner of the General Land Office, or whether its title to the said tract of land has been since that time acknowledged by the United States.

Defendant denies that its title under the said act of Congress approved August 14th, 1848, to said tract of 97.39 acres of land has been unquestioned by any one; but defendant says that about the 185 one Joseph Watt, of Salem, aforesaid, filed a notification of his intention to claim said tract of land under the provisions of an act of Congress approved Sept. 27, 1850, commonly known as the "donation law," and entered upon, resided upon, and cultivated said tract, as he was required to do to secure a title thereto under the said act of September 27th, 1850, and the defendant has never been allowed a patent therefor.

Defendant says that it has the right to more than one tract of land under the said act of August 14th, 1848, and claims that it has a right to as (page 8.) 1 many tracts of land as it occupied as missionary
2 stations among the Indian tribes on the 14th day of Aug-
3 ust, 1848, within the meaning of the act aforesaid.
4 This defendant, further answering the com-
5 plainants' bill, says: Prior to the year 1840, through its
6 agents and missionaries duly authorized and empowered
7 to act for it in that behalf, caused a missionary station
8 to be established at a point in the Columbia River, then
9 known as "Wascopum," which point was at what
10 was then called The Grand Dalles of said river.

And its said agents and missionaries then made claim to a tract of land at that point for the purpose of carrying on the missionary labors in which they were then engaged, which said tract of land is the same, as nearly as defendant, by a survey, could ascertain, as the tract of 643.37 acres described in complainants' bill. And defendant says that it opened a farm upon said tract of land, erected thereon a dwelling-house, a church, and other buildings which were requisite and necessary for successfully carrying on its missionary labors. And from the time it so took possession of said land it carried on its proper missionary labors there continuously, with vigor and effect, until about the month of September, 1847, having during the period it had occupied and labored at that place expended not less than thirty thousand dollars in organizing, supporting, and carrying forward its missionary work.

That about the month of August, 1847, while said station was in full and vigorous operation under the charge of the agents and missionaries of the defendant, an arrangement was effected between the agents of the defendant and one Dr. Marcus Whitman, then an agent of the "American Board of Commissioners of Foreign Missions," a duly incorporated society incorporated and existing under the laws of the State of Massachusetts, and then engaged in missionary labor in Oregon Territory, and particularly in that portion of said Territory which lay east of the Cascade Mountains, by which it was agreed that the said agent

of the said American board could be allowed to take the said missionary station, instead of the agents and missionaries of the defendant, provided the said agent of the said American board would agree to and would cause the said missionary labors to be continued there as they were then carried on by the defendant's missionaries, and provided, further, that the
61 said agent of the said American board would deliver to the agent of the defendant a check for the sum of six hundred dollars upon the said American board for certain personal property which was owned there by the defendant, and admits the said agent of the said American board desired to purchase*d*, to all of which the said agent of the said American board agreed, and thereupon drew the said check for the said sum of six hundred dollars for said personal property and delivered the same to the agent of the defendant, and about the month of September, 1847, with the distinct understanding that said missionary labors were to be continued at said station by said American board, and without any design of abandoning or discontinuing missionary labors or of permitting it to be done, the defendant's agents and missionaries withdrew from said station, and permitted the said agents of the said American board to take possession thereof. But the defendant's agents and missionaries would not have withdrawn or have permitted the said agents of the said American board to take the said possession but for the said understanding and agreement that the said American board would continue said missionary labors *to* same as aforesaid.

That the defendant did not sell or dispose of, or receive any pay or any consideration whatever for the said station, or for the valuable im-
62 provements placed thereon by it at a great expense; that it was the intention of the said Dr. Marcus Whitman, and the understanding of the agent of the defendant at the time said arrangement was made, that the said Dr. Whitman should take charge of said station as the agent of the said American board and conduct the missionary labors in person.

That as soon as the temporary possession of said station was placed in his hands the said Dr. Whitman proceeded to make arrangements to take permanent possession thereof in person, and in making which he was necessarily required to be temporarily absent therefrom, during which time he pro*duced* other agents of said American board to take temporary charge thereof and to conduct missionary labors in his absence.

That during his absence he was attacked by the hostile Indians, who at that time had risen against the whites, and he and a number of other persons were murdered by them, so that it was not possible for him to return and take possession of said station, as he had intended, and to conduct the said missionary labors there.

That the said Dr. Whitman was murdered about the 27th day of November, 1847, and the agents left by him in temporary charge of said station were driven therefrom in a few days thereafter and were compelled to flee for their lives, by the hostile Indians; that the Indian hos-
63 tilities continued in that country for a long time, rendering it injudicious, unwise, and unsafe for either the agents of the said American board or the agents of the defendant to return to the said station until long after the 14th day of August, 1848.

That on account of the death of Dr. Whitman aforesaid, and on account of the Indian war which continued in that country—then and since known

as the "Cayuse war"—and on account of a proclamation and protest of one H. A. G. Lee, then a superintendent of Indian affairs under the provisional government of Oregon Territory, made on or about the month of July, 1848, and published at the time, warning Protestant missionaries not to venture into the said country, it became and was impossible for the said American board to do more than take temporary possession of said station, and therefore the remaining agents of the said American board, in the year 1849, and before the said Indian war was so far settled as to render it either judicious, wise, or safe for Protestant missionaries to resume missionary labor there, and in order to place the defendant in the rightful possession of what justly belonged to it, offered to retransfer the said station to the defendant upon the defendant delivering to the agent of the said American board the said draft for six hundred dollars;
64 that the agent of the defendant accepted the said offer, delivered up the said draft to the agent of the American board, who canceled the same, and the agent of the defendant at once resumed control of the said station.

That about the month of June, 1850, the Rev. William Roberts, then superintendent of the defendant's missionary affairs in Oregon, and as agent of the defendant, went to the said missionary station at The Dalles in company with Rev. A. F. Waller, one of the missionaries then, and for a long time prior thereto, in the service of the defendant, and who was in charge of said station at the time the same was allowed to pass temporarily into the possession of Dr. Whitman, in September, 1847, as hereinbefore stated. That at their arrival at said station it was not occupied by any one except the military, which had been occupying the same continuously since the month of December, 1847. That all the buildings which had been erected upon said grounds by the defendant, and which were in a good condition when the said possession was allowed to pass into the hands of the said Dr. Whitman as aforesaid, were then wholly destroyed or greatly injured, as were also all other improvements which had been placed upon
65 said tract of land at a great expense, to defendant for the purpose of making the same useful as a missionary station. That the said Roberts and Waller went to the said station in the said month of June, 1850, for the purpose of resuming missionary labors there among the Indian tribes, and to make an accurate survey and mark out the tract of land to which the defendant was entitled under the said act of Congress of August 14th, 1848. That at the time the said Roberts and Waller, with the aid of a surveyor, surveyed and marked out the tract of land which the defendant claimed, and to which it was entitled as a missionary station under the said act of Congress approved August 14th, 1848, and in locating and surveying the same they followed, as nearly as they were able to do so, the lines which it was then understood had been designated for the boundary of said missionary station by the original founders
66 thereof in 1836, the Rev. Jason Lee, H. B. Brewer, and others, the land so marked and surveyed being the 643.37 acres described in complainants' bill, and for a part of which defendant now holds a patent bearing date July 9, 1875. And said defendant says that while said Walker and Roberts were at said station in June, 1850, the said Waller held religious services there as a missionary among the Indian tribes, but did not continue such labor for the reason that he was forbidden to do so by the

military officer then in command of the troops at that place. That the said tract of 643.37 acres of land was then taken possession of by the said Roberts as the agent of the defendant, so far as he was able or was permitted to do by the said military officer, and that he re-established and resumed missionary labors there to as great an extent and continued the same as long as he was permitted to by the said military officer then in command, and that he caused the survey of said land and the notification thereof to be recorded in the records of land claims in Clackamas County, in said Territory of Oregon, on the 16th day of November,
67 1850, said missionary station and missionary claim being then within Clackamas County.

That on the 28th day of February, 1859, the said American board released all its right, title, and interest in and to the land and other property at the Dalles, to this defendant by its quit-claim deed duly executed and acknowledged on that day, in order to quiet any doubts as to the title of the defendant to said missionary station, and that the defendant has ever since held and still holds the said deed, which was duly recorded in the records of deeds of Wasco County, Oregon, on the 9th day of May, 1859. And defendant further says that about the month of March, 1854, Rev. Thos. H. Pearne, then the agent of the defendant, and for and in its behalf and in its interest, caused a notification of defendant's claim of title to said missionary station, containing 643.37 acres of land, under the said act of Congress of August 14th, 1848, with supporting evidence accompanying the same, to be filed in the office of the surveyor-general of Oregon. And defendant says that long after it had become the owner
68 of said tract of land under the said act of Congress approved August 14, 1848, and long after it had caused the same to be surveyed and marked by proper posts, stakes, and monuments, and had caused notice of said survey to be recorded in the record of land claims in the office of the recorder of said Clackamas County, the said W. D. Bigelow, about the month of November, then well knowing of defendant's claim to said tract of 643.37 acres, and well knowing that the defendant claimed, held, and owned the same under the provisions of said act of Congress approved August 14, 1848, wrongfully undertook to enter upon and to claim, and did wrongfully claim and pretend to have a right to hold and to acquire a title to a portion of the defendant's said tract of 643.37 acres, to wit, the lots of ground mentioned in complainants' bill, and therein particularly described; and by reason of his said wrongful, unjust, and unlawful claim the said Bigelow caused a controversy to arise between the said Bigelow and this defendant concerning the title
69 to the same, which the surveyor-general of Oregon was directed by the Commissioner of the General Land Office to hear and determine.

That in pursuance of said direction the surveyor-general, about the year 1860, after giving due notice to the said contending parties, proceeded to take testimony produced before him by the said Bigelow in support of his claim and of the defendant in support of its claim, and that about the year 1861, said surveyor-general erroneously decided said controversy against the claim of the defendant and in favor of the claim of said Bigelow, notwithstanding the evidence before him showed and clearly proved that the defendant and not Bigelow was the lawful and rightful owner. That the

defendant appealed from the said erroneous decision of the surveyor-general to the Commissioner of the General Land Office, who, acting under a misapprehension and mistake of both the facts and the law applicable to the said controversy, affirmed the said decision of the surveyor-general; and thereupon the defendant appealed again from the said decision
70 of the said Commissioner to the Secretary of the Interior, and the said Secretary, after a full, due, and careful examination of the evidence produced in said controversy, and of the law applicable thereto, reversed the said erroneous decisions of the Commissioner of the General Land Office, and decided and held that the defendant was the legal and rightful owner of said tract of land, and that the said Bigelow was not, which decision of said Secretary was just, right, and legal. Said decision was rendered on the 15th day of March, 1875, and thereafter, on the 9th day of July, 1875, a patent including the said premises claimed by said Bigelow was issued to the defendant. And defendant says that at the time of the pretended and alleged conveyance to them of the lots of ground in Bluff addition to Dalles City, as described in their bill of complaint, by the said W. D. Bigelow, said complainants had full notice of defendant's right, title, and interest in lots of ground, and then well knew that the defendant and not the said Bigelow was the lawful and rightful owner thereof,
71 and that the said Bigelow had no right in said land which he did or could convey to the complainants herein.

And defendant further says that after the title to the said tract of land of 643.37 acres had been confirmed in it by the said act of Congress approved August 14, 1848, the military authorities of the United States established a military reservation over a tract of land near the said Dalles, which extended over and included about 353 acres of the defendant's said mission claim. That afterwards the defendant presented a claim for $20,000 to the Secretary of War for damages it sustained by reason of the taking of the said 253 acres of its land for said military reservation.

That the said claim was referred by the Secretary of War to Major Rains in the year 1853, he being then in command of the military forces then stationed at the post then established upon said military reservation, for his report upon the merits of said claim and the right of the defendant to the said 253 acres of land. That the said Major Rains, having duly
72 and fully examined and inquired into the facts concerning the defendant's right to said mission claim, reported to the Secretary of War on day of , 185 , in favor of said claim, and recommended that the sum demanded be paid. That afterward the Secretary of War referred said claim to the Congress of the United States, and recommended that an appropriation be made for its payment. That said claim was referred by the House of Representatives to its Committee on Military Affairs of the 35th Congress, and after a full examination of said claim, and the right of the defendant to said tract of land under the said act of Congress approved August 14, 1848, said committee reported in favor of defendant's title to said land, and in favor of the payment of the said sum of $20,000, said report being dated January 28, 1859, and is found in House of Rep't's. Reports, No. 145, 2d session, 35th Congress, and in pursuance of said report the said sum of $20,000 was appropriated by an act of Congress entitled "An act for the relief of the Missionary Society of the Methodist Episco-

73 pal Church," approved June 16th, 1860, and the said sum was afterwards paid to the defendant. Of all of which the complainants had full notice before and at the time they undertook to purchase, and pretend to have purchased, said lots of ground from said Bigelow. And the defendant further says that the temporary possession of the said missionary station by the said agents of the American Board of Commissioners of Foreign Missions, under the said agreement with the agent of the defendant, and the failure of the said agents of the American board to comply with said agreement and the *and the* state of war, which prevented the agents and missionaries of the defendant from resuming possession of station after the agents of the American board were driven therefrom, in 1847, by hostile Indians, until long after the 14th day of August, 1848, did not destroy, impair, or affect the defendant's claim to said missionary station, containing the said 643.37 acres of land, nor in any manner affect its right thereto un-
74 der the said act of Congress approved August 14th, 1848, but defendant's right thereto under the said act remained the same as if the said agents of the said American Board of Commissioners of Foreign Missions had not had temporary possession thereof, or a state of war had not existed, and the agents of the defendant had retained and been in actual possession thereof until and on the said 14th day of August, 1848. That the complainants have acquired no right in the lots of ground described in their bill of complaint, nor in any part thereof, through the said claim of the said Bigelow, as against the rights of the defendant, and there is no equity in the said bill, and the prayer thereof ought not to be granted, but should be denied and the said bill dismissed. All of which matters and things this defendant is willing to aver and maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

JOHN C. CARTWRIGHT AND
75 RUFUS MALLORY,
Solicitors for Defendant.

DISTRICT OF OREGON, *ss:*

I, John C. Cartwright, being duly sworn, depose and say I am agent and attorney for the defendant in the above-entitled suit, and that the foregoing answer, as well the answers to interrogatories hereto appended are true, as I verily believe.

J. C. CARTWRIGHT.

Subscribed and sworn to before me this 12th day of August, A. D. 1878.

R. H. LAMSON, *Clerk.*

Defendant, answering the special interrogatories in the said complainants' bill of complaint contained, and answering each and all of them, answers and says:

To interrogatory numbered one the defendant answers no.

To interrogatory numbered two the defendant answers no.

76 To interrogatory numbered three the defendant answers yes, within the meaning of the act of Congress approved August 14, 1848, confirming said tract of land to the defendant.

(Endorsed:) Filed August 12th, 1878. R. H. Lamson, clerk.

76½ And afterwards, to wit, on the 28th day of September, 1878, there was duly filed in said court exceptions to answer, in words and figures as follows, to wit:

77 *Exceptions to answer.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT, complainants,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

The complainants now come and except to the following described portion of the defendant's answer, for the reason that the same is impertinent and irrelevant, to wit:

All that part of said answer commencing with the fourth line of page eight (8), to and including the word "dismissed," in the 22d line of page twenty (20).

JAMES K. KELLY,
Solicitor for Complainants.

(Endorsed:) Filed Sept. 28, 1878. R. H. Lamson, clerk.

77½ And afterwards, to wit, on Monday, the 28th day of October, 1878, the same being the 8th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

78 *Order.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAITE
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church. No. 392. October 28th, 1878.

Now at this day come the complainants in the above-entitled cause by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and, on motion of said complainants, it is ordered that this cause be set for hearing on the exceptions filed to the answer herein on Monday, November 1st, 1878.

(Signed) DEADY, *J.*

(Endorsed:) Filed and entered Oct. 28, 1878. R. H. Lamson, clerk.

78½ And afterwards, to wit, on Friday, the 1st day of November, 1878, the same being the 9th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

79 *Order.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.	No. 392. November 18, 1878.

Now at this day come the complainants by Mr. James K. Kelly, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and on motion of said defendant it is ordered that the hearing of this cause on exceptions be, and the same is hereby, continued till Tuesday, November 5, 1878.

(Signed) DEADY, *J.*

(Endorsed:) Filed and entered November 1, 1878. R. H. Lamson, clerk.

79½ And afterwards, to wit, on Tuesday, the 5th day of November, 1878, the same being the 11th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

80 In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAITE, *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.	No. 392, November 5, 1878.

Now at this day come the complainants by Messrs. James K. Kelly and N. Gates, of counsel, and the defendant by Messrs. Rufus Mallory and John C. Cartwright, of counsel, and this cause comes on to be heard on the exceptions filed to the answer herein; and the court, having heard the argument of counsel, will advise thereof.

80½ And afterwards, to wit, on Monday, the 18th day of November, 1878, the same being the 13th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in siad cause, to wit:

81 *Order.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT *vs.* THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.	No. 392. November 18, 1878.

Now at this day came the complainants by Mr. James K. Kelly, of

counsel, and the defendant by Mr. Rufus Mallory, of counsel, and this cause having been heretofore heard on the exceptions filed to the answer herein, and argued by counsel, and taken under advisement by the court, and now at this day the court being fully advised in the premises, it is ordered and adjudged that said exceptions be, and they are hereby, disallowed, and that complainants have ten days in which to file their reply.

(Signed) DEADY, *J.*

(Endorsed:) Filed and entered November 18, 1879. R. H. Lamson, clerk.

81½ And afterwards, to wit, on the 20th day of November, 1878, there was duly filed in said court a replication in words and figures as follows, to wit:

82 *Replication.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT, complainants,
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church, defendant.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied *to be replied* unto by these repliants, without that, that any other matter or thing in said answer contained, material or sufficient in the law to be replied
83 unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All of which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

N. H. GATES,
Solicitor for Complainants.

(Edorsed:) Filed November 20, 1878. R. H. Lamson, clerk.

83½ And afterwards, to wit, on Monday, the 6th day of October, 1879, the same being the 1st judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

84 *Order.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.
No. 392. October 6, 1879.

Now at this day come the complainants by Mr. James K. Kelly, of counsel, and the defendant by Mr. John C. Cartwright, of counsel, and by agreement of counsel it is ordered that this cause be, and the same is hereby, set for trial on Wednesday, October 15, 1879.

(Signed)

DEADY, *J.*

(Endorsed:) Filed and entered October 6, 1879. R. H. Lamson, clerk.

85 *Order.*

And afterwards, to wit, on Monday, the 13th day of October, 1879, the same being the 4th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said cause, to wit:

JAMES K. KELLY AND AARON E. WAITE
vs.
THE MISSIONARY SOCIETY OF THE METHODIST Episcopal Church.
No. 392. October 13, 1879.

Now at this day come the complainants by Mr. James K. Kelly and Mr. N. H. Gates, its solicitors, and the defendant by Mr. Rufus Mallory and Mr. John C. Cartwright, its solicitors, and this cause comes on to be heard on the bill, answer, testimony, and exhibits.

85½ And afterwards, to wit, on Wednesday, the 3d day of December, 1879, the same being the 30th judicial day of the regular October term of said court, present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in this cause, to wit:

86 *Decree.*

In the circuit court of the United States for the district of Oregon.

JAMES K. KELLY AND AARON E. WAIT
vs.
THE MISSIONARY SOCIETY OF THE M. E. Church.
No. 392. December 3, 1879.

This cause having been heretofore heard on the bill, answer, reply, the testimony, and exhibits, and argued by Mr. James K. Kelly and Mr. N. H. Gates, of counsel for said complainants, and by Mr. Rufus Mallory

and Mr. John C. Cartwright, of counsel for said defendant, and taken under advisement by the court, and now at this day the court, being fully advised in the premises, does find that the equity of the case is with the complainants; that the land described in the bill of complaint herein, to wit, lot four in block one; lots one, two, three, eleven, and twelve and thirteen in block two; lot one in block three; lots eight and eleven in block five; lots six, nine, and twelve in block six; lots five, eight,
87 and eleven in block seven; and lots two, nine, and fifteen in block eight, all in the Bluff addition to Dalles City, Wasco County, Oregon, was voluntarily abandoned by the defendant as a missionary station in September, one thousand eight hundred and forty-seven, and was not thereafter occupied by the defendant as a missionary station or otherwise, and that the same was not confirmed to the defendant by the second proviso of section one of the act of Congress entitled "An act to establish the territorial government of Oregon," approved August fourteenth, one thousand eight hundred and forty-eight; that the patent issued to the defendant by the United States on July ninth, one thousand eight hundred and seventy-five, for and including the said described lands, was wrongfully issued; that the complainants are the owners in fee of the said described lands by virtue of a grant under the act of Congress entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands,
88 approved September twenty-seventh, one thousand eight hundred and fifty, to Winsor D. Bigelow, and by sundry mesne conveyances from him to the said complainants, and are entitled to the patent therefor. It is therefore adjudged and decreed that the defendant received the patent for the above described lands as trustee for the several complainants herein, and that said defendant do, within ninety days from the date hereof, convey to said complainants, by a good and sufficient deed of conveyance, with proper covenants against its own acts, to be approved by the master of this court, all the right, title, and interest in the above described lands, which it received by means of said patent, and that it pay to said complainants their costs and disbursements herein, taxed at dollars.

(Signed) DEADY, *J.*

(Endorsed:) Filed and entered December 3, 1879. R. H. Lamson, clerk.

88½ And afterwards, to wit, on the 3rd day of December, 1879, there was duly filed in said court Judge Deady's decision in words and figures as follows, to wit:

89 *Judge Deady's decision.*

DECISION IN THE U. S. CIRCUIT COURT, DEADY, J.

U. S. circuit court, district of Oregon.

WEDNESDAY, *Dec.* 3, 1879.

THE MISSIONARY SOCIETY OF THE M. E. Church. *v.* } No. 390. Suit in equity to establish a trust and for a conveyance.

JAMES K. KELLY & AARON E. WAIT
v.
THE SAME.
No. 392. The same.

(1.) GRANT TO MISSIONS IN OREGON.—The grant to religious societies of mission stations in Oregon, contained in § 1 of the act of August 14, 1848 (9 Stat., 323), is not confined to a single station to each society, but includes as many stations as were then actually occupied by each society for missionary purposes among the Indians.

(2.) PATENT—SURVEY.—A patent issued under § 2447 of the R. S. upon a survey not approved by the surveyor-general is void; and in case of a grant under § 1 of the act of Aug. 14, 1848, the survey to be approved by the surveyor-general necessarily involves the determination of the question: What is the quantity and boundary of the claim?

(3.) MISSION STATION.—The grant to religious societies contained in the act aforesaid of the missionary stations occupied by them in Oregon on August 14, 1848, not exceeding 640 acres, is not confined to the land actually enclosed and cultivated by them, but should be construed to include the maximum quantity at each station occupied by them—that is, claimed and in any way used by them, and not in the actual occupation of any one else.

(4.) OCCUPATION OF MISSION STATION.—Occupancy is a word of narrower signification than possession, and means to possess by laying hold of or being actually upon the thing possessed continuously and exclusively. Prior to August 14, 1848, the title to all lands in Oregon was in the United States, and therefore no person could have constructive possession of any portion thereof, or any possession thereof, or interest therein, except actual possession or occupancy, and when this was given up or abandoned the relation of the party to the land was absolutely terminated.

(5.) MISSION STATION AT THE DALLES.—The Missionary Society of the M. E. Church established a mission among the Indians at Wascopam, near the Grand Dalles of the Columbia, in 1838, and in September, 1847, abandoned and transferred the same to Dr. Whitman, of the Presbyterian mission at Wailatpu, and never reoccupied the same: Held, that the society did not receive a grant of said station under § 1 of the act of August 14, 1848, because it was not at that date in the actual possession and occupation of the premises; that such occupation was a condition precedent to the taking effect of such grant, and therefore it mattered not whether the failure of the society to occupy the station in August, 1848, was voluntary or was caused by the fear of hostile Indians.

(6.) PAYMENT BY CONGRESS.—The payment by Congress to the missionary society of $20,000, in June, 1860, on account of the reservation of 353 acres of The Dalles mission station in March, 1850, for military purposes, and the loss or destruction of property thereon since 1847, by Oregon volunteers, Indians, or United States troops, did not have the effect to invest the society with the title to such station then or on August 14, 1848; nor was it even an admission that the society had any legal right to the premises, but only that it asserted some kind of a claim thereto which it was deemed expedient to extinguish; nor could Congress, in June, 1860, by a direct recognition of a prior grant to the society, affect the rights of others already acquired in the premises under the town site and donation acts.

DEADY, J.

These three suits were commenced on September 18, 1877, in the circuit court for the State in the county of Wasco. The summons was served by publication, and on September 12 the defendant appeared and had the causes removed to this court, where they were entered on January 30, 1878.

On April 9 there was a demurrer filed to each complaint, which was disallowed, and thereupon, by the direction of the court, on May 2, the plaintiffs in each suit restated their case in the manner of a formal bill in equity. On August 12 the defendant answered the bills, and on September 20 the plaintiffs filed the general replication. In the course of the proceedings exceptions for impertinence were taken to both the bills and the answers, which were disallowed, and questions raised thereby reserved for consideration upon the final hearing.

On October 15, 1879, the causes were heard together upon the several bills, answers, replications, and the exhibits and depositions in each, and in No. 390, so far as they were applicable to the other two.

Before touching the grounds of the controversy between the parties, it may be well to state their respective cases, so far as they rest upon either the admitted facts or those established beyond controversy.

The defendant is a corporation formed under the laws of New York, and from 1838 to September, 1847, maintained a mission among the Wascopam Indians on the south bank of the Columbia River, at the lower end of the Grand Dalles thereof, at a place since called "The Dalles," in what is now Wasco County; and on July 9, 1875, received a patent from the United States under § 2447 of the R. S. for a tract of land, containing 643.37 acres, including the ground occupied by the improvements made at such mission, less 350 acres thereof included in the military reservation, the same being parts of sections 3 and 4, in T. 1 N., of R. 13 W., and section 33, in T. 2 N., of R. 13 W. of the Wallamet meridian, as a mission station occupied by it on August 14, 1848, within the purview of the second proviso to § 1 of the act of that date "To establish the territorial government of Oregon" (9 Stat., 323), which provides "that the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes of said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong."

The plaintiffs claim that the defendant did not occupy this tract, or any portion of it, as a missionary station, or otherwise, on August 14, 1848, or since September, 1847, and that therefore it was not within the purview of said proviso, and the patent to the defendant was wrongfully issued; and also that they are the owners of and entitled to the patent for certain portions of said tract, as hereinafter stated, and ask to have their several rights therein established and declared, and that the defendant be so far regarded as their trustee and required to convey to them accordingly.

In 1852 the place called "The Dalles" was occupied as a town site for the purpose of business and trade, and has been so occupied ever since, and in 1855 the county of Wasco caused the same to be surveyed into lots, blocks, and streets, and said survey to be recorded; that on January 26, 1857, the plaintiff in 390, Dalles City, was made a municipal corporation, with boundaries including said town site, and on April 18, 1860, entered, at the proper land office, the fractional NW. ¼ of said section 3,

containing 112 acres, and including the land so occupied as a town site, under the town site law of May 23, 1844 (5 Stat., 667; 10 Stat., 306), in trust for the several use and benefit of the occupants thereof according to their respective interests, and now claims to be the owner thereof accordingly.

On November 1, 1853, Winsor D. Bigelow became a settler under the donation act upon 320 acres of the public land, including parts of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of said section 3, and now known upon the plats of the public surveys as donation claim No. 40, and resided upon and cultivated the same until February 16, 1860, and otherwise complied with the requirements of said act; that on December 9, 1862, said Bigelow conveyed an undivided $\frac{1}{3}$ interest of a certain 27 acres of said donation to James K. Kelly and Aaron E. Wait, plaintiffs in No. 391; and on December 12, 1864, conveyed the remaining $\frac{2}{3}$ of said 27 acres to Orlando Humason, who, on September 8, 1875, died testate, having devised the same to Phœbe Humason, his widow, and a plaintiff in No. 391, which 27 acres said plaintiffs, by reason of the premises, claim to own as tenants in common thereof.

On December 2, 1864, said Bigelow conveyed to said Kelly and Wait, the plaintiffs in No. 392, 46 town lots within the limits of his said donation, and situate in what is known as the "Bluff addition to Dalles City," which lots the plaintiffs in No. 392, by reason of the premises, claim to own as tenants in common thereof.

It is claimed by the defendant that in August, 1847, it agreed to turn over the missionary station at The Dalles, with the improvements thereon, to Dr. Marcus Whitman, the agent of the American Board of Commissioners for Foreign Missions, and then engaged as a lay missionary of said board, at a place called Wailatpu, about 140 miles ENE. of The Dalles, upon the understanding that said board would maintain a mission there among the Indians, and that said Whitman would pay $600 for certain personal property belonging to the mission; that in pursuance of said agreement said Whitman gave the defendant a draft upon said board for said $600, and the defendant's agents and missionaries, between September 1 and 10, 1847, surrendered the station to said Whitman; that owing to the death of said Whitman, on November 29, 1847, said agreement
90 was canceled in 1849 by the surrender of said draft to the agent of said board and the "retransfer" of said station to the defendant, who thereupon resumed control of the same; that in June, 1850, the agent of the defendant went upon the ground and surveyed and marked the boundaries of the claim, as he understood them to be, and that in 1854 the Rev. Thomas H. Pearne, its agent, notified the surveyor-general of the Territory of the claim of the defendant thereto; but said defendant substantially admits that from the delivery of said station to Whitman as aforesaid, it never actually occupied the same for mission purposes, or otherwise, and claims that it was prevented from so doing by the danger from Indian hostilities, growing out of what is known as the Cayuse war.

The Commissioner of the General Land Office authorized the surveyor-general to hear and determine the conflicting claims of the defendant Bigelow and Dalles City to the premises, and on February 16, 1860, the parties appeared before him, and on February 2, 1861, said officer decided that the defendant had no right to the land in controversy; which decision,

on an appeal to the Commissioner, was, on February 7, 1863, affirmed. From there the case was carried by appeal before the Secretary of the Interior, who, on March 15, 1875, reversed said decision and decided that the defendant was entitled to the premises as a mission station, and directed a patent to issue to it accordingly.

Section 2447 of the R. S., under which this patent issued to the defendant, is taken from the act of Dec. 22, 1854, authorizing the issue of patents in certain cases, and only applies where there has been a grant by statute without a provision for the issue of a patent. In such a case the section provides that a patent may issue for the grant "upon a survey thereof approved by the surveyor-general," and "found correct by the Commissioner;" subject, however, to the qualification that "such patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

The patent in question expressly declares that it is issued to the defendant subject to this qualification. There is then no question in this case of the power of this court to investigate the grounds upon which this patent was issued and to determine that they were insufficient or otherwise, either in law or fact, and decree accordingly. The patent and the subsequent action of the parties has had the effect to remit the case to this forum to try and determine to whom the patent should have issued for the portions of the tract claimed by the plaintiffs.

It is admitted that the plaintiffs are entitled to the patent for the portions claimed by them unless the defendant was entitled to the tract as a mission station under § 1 of the act of August 14, 1848.

On April 30, 1853, the defendant, by its agent, Rev. Thomas H. Pearne, notified the land department of its claim to a mission station near Salem, in Marion County, the same being parts of sections 23 and 26 in T. 7 S., of R. 3 W. of the Wallamet meridian, and containing 97.39 acres, which claim was allowed.

And now the plaintiffs contend that under the act, a religious society can only receive a grant of one mission station, and the defendant, having elected to take the station at Salem, is therefore barred from claiming the one at The Dalles.

I do not think this is the most reasonable construction of the statute. It grants the land "occupied as missionary stations" to the several religious societies to which said stations respectively belong. It is true that this language would be satisfied with the grant of one station to each society. But it is broad enough, in my judgment, to cover more, if more there were, and ought to have effect accordingly, unless there is some controlling reason to the contrary in the circumstances of the case. If it had been the intention of Congress to limit the grant to one station to each society such intention would have been more naturally expressed by saying, "the land occupied as a missionary station to each religious society to which such station belongs." And this construction is strengthened rather than otherwise by reference to the surrounding circumstances. For some years prior to the passage of the act of August 14, 1848, there were three religious societies engaged in missionary labors among the Indians in Oregon—the Methodist Episcopal, the Presbyterian, and the Roman Catholic. The

first missionaries of the former came to Oregon with Wyeth in 1834 and established a mission at Wallamet, below Salem, which was afterwards removed to the latter place. Subsequently their numbers were increased, and they established missions at The Dalles, Nesqually, and Clatsop. The Presbyterian missionaries came to the country under the auspices of the American board in 1836, and established a mission at Wailatpu, near what is now called Walla Walla, with Marcus Whitman at its head. Afterwards they established missions at Lapwai and Spokan—all east of the Cascade Mountains. The Roman Catholic missionaries came from Canada with the Hudson Bay train in 1838. They established the mission St. Paul in the Wallamet, near Champoeg, and Cowlitz on the Cowlitz River. Later they established missions in Eastern Oregon and held occasional missionary services among the Indians at many points in the country. In June, 1848, they established a mission at The Dalles, to the west and adjoining the land in controversy.

The country in which these grants were made was an immense territory, extending from the 42d to the 49th parallel of north latitude, and reaching from the Rocky Mountains to the Pacific Ocean. Outside of these missions and the Hudson Bay posts, practically, it was unoccupied, except sparsely in the Wallamet Valley. The missionaries were very properly regarded as having promoted the settlement and civilization of the country, and there was no reason why, if Congress saw proper to recognize their services either as settlers or missionaries, by granting them the land occupied by them as mission stations, it should confine the grant to one station to each society when more were occupied by it.

It is also insisted that this patent is void as not having been issued upon "a plat of survey thereof" approved by the surveyor-general, but upon the survey made by the agent of the mission, in June, 1850. I think it is plain that a patent issued upon a survey or diagram not approved by the surveyor-general would be void. For instance, a patent could not lawfully issue upon the survey of the claim by the society itself, because a survey of the grant involved the question of how much land was occupied by the mission and within what limits. To allow the society to do this would be to make it a judge in its own case.

The grant was only of the land occupied which might be less than 640 acres, and the surveyor-general was required to ascertain the quantity and its boundaries before he could approve a survey thereof to enable the department to issue a patent therefor.

When the surveyor-general was authorized to hear the contest between these parties, on February 23, 1860, he directed a deputy surveyor to make a survey of the premises: (1) as claimed by the society; (2) as actually occupied by it; and (3) so as to include its improvements with 640 acres south of the bluff, in substantially a square form. Plats of these surveys—the second one containing 87 acres—were forwarded to the Commissioner by the surveyor-general with his decision that the society was not entitled to any portion of the premises as a missionary station. Neither of these "plats of survey" were approved by the surveyor-general in the sense of the statute, because they were each made upon a hypothesis—that the society occupied the premises or some portion of them as a mission station on August 14, 1848—which he at the same time found not to be true.

But on March 29, 1875, and after the decision of the Secretary of the Interior, the Commissioner wrote to the surveyor-general advising him of such decision and directing him to furnish that office with a "certified diagram of the claim of said society" as confirmed by the same. In obedience to this direction the surveyor-general, on June 17, 1875, certified to the Commissioner a diagram of the first of the three surveys, as being a plat of the survey of the Methodist mission claim at The Dalles, and upon this the patent was issued as appears therefrom.

Whatever, then, may be thought of the correctness of the survey, the proposition that the patent was issued without a plat of survey approved by the surveyor-general, in the face of these facts, is not tenable.

91 It is also contended by the plaintiffs that if the defendant is entitled to take under the act as a missionary society at all, the grant should be confined to the land actually occupied by it.

This grant, unlike the one made by the donation act, is not of the 640 acres occupied by the donee, but of the quantity occupied, not exceeding that number of acres. Still it could not have been the intention of Congress in the one case more than the other that the occupation of a donee should be limited to his actual enclosure and tillage. The donation act of September 27, 1850 (9 Stat., 497), was in this respect a sort of supplement to the act of August 14, 1848, and did for the settlers at large what the former had done for the missionaries. It gave to the settler then residing in the Territory, for himself and wife, the section of land which he had resided upon and cultivated for four consecutive years. But this residence and cultivation was not required to include the whole section. In fact, the actual enclosure and cultivation was often confined to a very few acres, while the remaining portion was only occupied for grazing, and sometimes hardly that.

Very early in the settlement of this country it became a cardinal rule that a settlement on the public lands should not include any more than a section. This was probably suggested by the terms of the Oregon bill introduced into the Senate by Dr. Linn, of Missouri, in 1842, which, among other things, proposed to give 640 acres of land to each white male inhabitant of the Territory over 18 years of age. Prior to this time the missionaries had claimed large areas at their several stations, but as generally there was no one to dispute such claim, it mattered little one way or the other. In December, 1843, the mission at Salem was surveyed and platted at 16 sections. But on July 5, 1843, the people adopted a land law which limited the extent of a claim or settlement to 640 acres, with a proviso that any mission "of religious character," established before that time, might contain six miles square. (Or. Laws, 1874, p. 50 n.)

Under these circumstances I think the grant to the missionary societies ought to be construed to include 640 acres at each mission station occupied by them—that is, claimed and used by them according to the circumstances of the time and place, and not in the actual occupation of any one else.

In the case under consideration there does not appear to have been any survey or marking on the ground of the boundaries or limits of the claim until June, 1850. But it was doubtless well understood by the occupants and the Indians that it should extend a certain distance in certain directions, or that it should include certain points or places—as, the improvements, the mill site, etc.; though I do not think that it was ever expected

or intended that it should extend north of the bluff, between which and the river—a distance of about half a mile—were the villages and camping ground of the Indians and voyageurs up and down the Columbia River.

And this brings me to the consideration of the question, whether upon the evidence the defendant occupied this mission station so as to be entitled to the grant thereof under the act of August 14, 1848.

The evidence is somewhat meagre and upon some points contradictory. It consists largely of the testimony of persons deeply in sympathy with the defendant, to facts and circumstances occurring thirty years ago, and scattered over a considerable period of time. The correspondence between the defendant and its agents here concerning the occupation and transfer of this station is not produced. It is presumed to have been in writing and within the knowledge and control of the defendant, and therefore the omission to produce it is a matter which must have more or less weight against the defendant, according to the circumstances of the case. Portions of the evidence partake of the character of hearsay, and some of it is decidedly argumentative. In considering it it will be impossible to ignore the history of the period and place to which it relates. Reading it, then, by this light, and, where it is contradictory or obscure, supplementing it from this source, the material facts about the settlement and occupation of the mission station at The Dalles are these:

In the spring of 1838 the Rev. Daniel Lee and Rev. H. K. W. Perkins, under the direction of the Rev. Jason Lee, the superintendent of the defendant in Oregon, established a mission station within the limits of the tract described in the patent herein, at a place then called Wascopam. In the fall of the same year it was stocked with cattle from the Wallamet Valley. The place was favorably situated for trade and intercourse with the Indians, and immigrants from the East—the latter usually, at this point, exchanging their wagons for boats and often bartering their poor oxen for supplies, such as fresh beef and the like.

In 1840 Mr. H. B. Brewer went to reside there as a farmer for the mission. Perkins and Lee left the mission for the East in 1844, and the Rev. A. F. Waller joined it about the same time. Waller and Brewer remained there until the transfer of the station to Whitman in 1847. In 1844 the Rev. George Gary superseded Jason Lee as superintendent of the Oregon mission. Apparently the society had become dissatisfied with the secular character and cost of the missionary operations, and sent Gary here to bring about a change in this respect. To this end, soon after his arrival in the Territory, the varous mission stations, except The Dalles, and all the mission property, consisting mainly of large herds of horses and cattle, were disposed of to members of the mission; so that, after 1844, the defendant had no "mission among the Indian tribes" in Oregon, except at The Dalles. Thereafter the labors of its faithful clerical missionaries, of whom but a few remained in the country, were devoted to the growing "white settlements" in the Wallamet Valley. In the language of one of them, "The finances of the Oregon mission were thus summarily brought to a close, and the mission was not only relieved of a ponderous load, but assumed a decidedly spiritual character." (Hines' Oregon, 242.)

In July, 1847, Mr. Gary was succeeded as superintendent of the mission by the Rev. William Roberts. Prior to this, and in the spring of that year, Mr. Gary had disposed of nearly all the live stock of The Dalles

mission station, and was negotiating with Dr. Whitman for the transfer of the station itself. Mr. Roberts, in continuation of the policy manifested by his predecessor, followed up these negotiations until, in August, an agreement was made for the abandonment or transfer of the station to Whitman, together with the sale of a canoe, some farming utensils, grain, and household furniture, for the sum of $600; and between September 1 and 10, 1847, Messrs. Waller and Brewer, the agents of the defendant, delivered the possession of the premises to Whitman, who took actual possession thereof, and placed his nephew—Perrin B. Whitman, a youth of 17 years—in charge, while he proceeded to his mission station at Wailatpu.

Dr. Whitman was not a minister, but at the time of the transfer of this station to him it was understood and expected that religious services and instruction would be in some way kept up there for the benefit of the Indians; but there was no legal obligation to that effect, nor did the defendant or its agents have any intention or expectation of returning or occupying the station if such services and instruction was not furnished, or otherwise. In pursuance of the settled policy of the defendant, the station was absolutely and unqualifiedly abandoned to Dr. Whitman, without any reservation or right to resume the possession under any circumstances.

Dr. Whitman, whatever his purpose may have been in regard to the Indians, purchased the station primarily for himself and nephew, Perrin B., to whom he promised the west half of it if he would remain and take care of it until the spring, when the former intended to return there and make it his permanent home.

At the time the defendant abandoned this station there was about 70 acres under some kind of enclosure, about one-half of which had been under cultivation. There were 6 moderate sized buildings upon the premises—a dwelling, meeting, school, and storehouse, barn and workshop, built of logs, except the dwelling, which was a frame filled in with adobe. The buildings were plain and constructed mostly with Indian labor, and did not cost to exceed $4,000, at which valuation they were afterwards—on June 16, 1860—paid for by the United States upon the claim and estimate of the defendant to that effect. (See H. of R., Rep. No. 145, 2 ses. 35 Cong.; 12 Stat., 44.)

On November 29, 1847, Dr. Whitman and others were murdered at Wailatpu, by the Indians of that station, and this was followed by what is known as the Cayuse war, in which the people of Oregon, under the provisional government, undertook to chastise the Cayuse Indians for this massacre. By midsummer of 1848 hostilities had ceased and peace was established; and in the latter part of the summer the troops were withdrawn from the country and returned to their homes.

About December 16, Perrin B. Whitman, who had remained in charge of the station at The Dalles, being apprehensive of danger, left for the Wallamet Valley, taking with him Mr. Alanson Hillman, whom
92 his uncle had sent there from Wailatpu in October as a farmer and housekeeper. A detachment of volunteers soon after occupied the premises with the permission of said Whitman, and it remained in the possession of the troops of the provisional government until they were withdrawn from the country, as stated. Thereafter, the premises remained unoccupied, except occasionally by passing travelers and immigrants, until the spring of 1850, when a military post was established there by the United States, and the premises included in a military reserve.

There never were any Indian hostilities at The Dalles or within 100 miles of the place. The immigrations of 1848 and 1849 came through the country without molestation, and from early in 1848 there was no more danger of Indian difficulties or hostilities at The Dalles than there was prior to September, 1847.

In the spring of 1849, the news of the passage of the organic act with the clause making a grant to missions reached Oregon. The death of Whitman had prevented the occupation of the station at The Dalles by him, either for himself or as the agent of the American board, or both. The draft of $600 which he had given upon the board in payment for it, had never been presented. Whatever might be thought of the claim of the defendant there could be no ground for claiming the premises as a place ever occupied by the American board as a mission station. Thereupon, about the last of February or first of March, 1849, an arrangement was made between the superintendent of the Oregon mission and Messrs. Elkanah Walker, Henry H. Spaulding, and Cushing Eells, three missionaries of the American board, by which the station was retransferred to the defendant and the draft aforesaid cancelled; and this was done by the defendant, not with any view of resuming missionary work there among the Indians or otherwise, but solely to enable it to claim and obtain, if it could, a grant of the premises from the United States on account of its occupation prior to September, 1847, and the subsequent circumstances. To the same end and to assist it in obtaining damages from the United States for taking a portion of the station as a military reservation, the defendant, on February 28, 1859, obtained from the American board a formal deed of quit claim to the premises, although on November 3, 1858, Messrs. Walker and Eells, professing to act upon a power to them from said board, dated February 28, 1852, for a nominal consideration, had conveyed the premises, subject to the military reservation, to Messrs. M. M. McCarver and Samuel L. White.

Upon this state of facts there is no ground to claim that the defendant acquired the title to this station on August 14, 1848, under the act of that date. It had abandoned the place voluntarily and without any expectation or intention of returning, and was no more within the purview or operation of the act than if it had never been upon the ground. The grant only applies to such stations as were occupied on August 14, 1848. To occupy is to possess—not constructively but actually. The word is of a more limited signification than possession. It is derived from ob and capio—to lay hold of—and means to possess by having hold of or being actually upon the thing possessed, continuously and exclusively. Therefore there can be no such thing as constructive occupancy. But when one has the complete legal title to land, and is therefore entitled to the possession of the same in law, he is deemed to have it. (U. S. v. Arrendendo, 6 Pet., 743.) But prior to August 14, 1848, there could be no such possession of lands in Oregon, because the legal title was in the United States. Occupancy or actual possession was the only interest any one then had in lands in Oregon, and when that was given up or abandoned the relation of the party to the land was absolutely terminated, and it was open to occupation by the next comer as though the foot of man had never been upon it. (Lownsdale v. City of Portland, 1 Deady, 1.)

Prior to August 14, 1848, the only interest which the defendant had in

the premises was that of occupancy or actual possession. It therefore could have no constructive possession of the land. If this actual possession or occupancy existed at the passage of the act making the grant, the title of the United States was then and thereby and on that account vested in the defendant, but not otherwise. The act makes the grant to take effect, not upon an occupation which preceded or followed it, but upon that which was contemporaneous with it. The grant was made upon the condition precedent that the defendant was then in occupation of the premises. Intention or desire to occupy is of no avail; and for the want of this occupation there is no excuse or equivalent. Even taking the view of the matter sought to be maintained by the defendant, that it was prevented from occupying the premises on August 14, 1848, by Indian hostilities, still the case clearly falls within the ruling in Ford v. Kennedy, 1 Or., 166, in which it was held that the grant in § 4 of the donation act of 640 acres of land to married persons who had resided upon the same for 4 years prior thereto, or to their heirs in case of their death before the patent issued, did not include the heirs of married persons who had died before the passage of the act, because, by the terms thereof, the grant was limited to persons residing in the Territory at the time of its passage—then in being. So in this case the grant only applies to stations then occupied for missionary purposes, and if for any reason a station was not then so occupied it is not within the purview of the act—it matters not how long or how effectively missionary operations had been carried on there at some former period. The station at Wailatpu would in all probability have been occupied by the Presbyterian Society on August 14, 1848, but for the massacre of the missionaries there on November 29, 1847. But this fact did not excuse or was not equivalent to such occupation. Therefore, in the passage of the act to organize Washington Territory, passed March 2, 1853, when Congress had this subject before them with reference to the missionary stations in the proposed Territory, the grant was repeated in the terms of the Oregon act, with the addition of the words, "or that may have been so occupied as missionary stations prior to the passage of the act establishing the territorial government of Oregon." This change was manifestly made to meet the case of the Wailatpu mission, which was not occupied as a mission station on August 14, 1848, and upon the theory that for want of such occupancy it was not granted by the Oregon act to the society which Dr. Whitman represented during his residence upon it, prior and up to the time of his death. But such want of occupancy being neither the result of a voluntary abandonment or a fleeing like the hireling from the wolf, but of the death of the faithful occupant at his post by Indian treachery and violence, Congress was induced to extend the terms of the grant so as to include that case.

But, as has been shown, there is not the slightest ground for saying that The Dalles station was abandoned by the defendant's missionaries on account of fear of the Indians or that such cause prevented its occupation by them in August, 1848. On the contrary they deliberately abandoned it without any intention of returning, because of a change of policy on the part of the society, and if the act of 1848 had not contained the clause making grants of mission stations as it did, it is morally certain that we would never have heard of this manifest afterthought, that Whitman was to keep up the missionary work at The Dalles, in some sense as the representative of

and for the defendants, and that upon his death the station would have been reoccupied and held by it as a mission but for fear of the Indians.

But it is urged that Congress has recognized the validity of the defendant's claim to this land by the passage of the act of June 16, 1860 (12 Stat., 44), "for the relief of the missionary society of the Methodist Episcopal Church," which provided that there should be paid to said society "the sum of $20,000, upon filing in the proper department a release to the United States, to be approved by the Attorney-General, of all claim to the land embraced within the limits of the military reservation at The Dalles in Oregon Territory, and of all claim for damages for destruction of property on or near the said land by the United States troops or volunteers or Indians at any time anterior to the date of said release."

To fully comprehend the motive and scope of this act, it is necessary to state that in 1854 the military reservation at The Dalles which had covered a number of square miles, was, by an order from the War Department, reduced to 640 acres, to be laid off in such a manner as least to interfere with private rights. In the execution of this order only 353 acres of the mission station, as surveyed in 1850 by the defendant, including all the improvements thereon, were embraced in the reservation. The society at once asked for compensation. The matter was referred by the department to Maj. G. J. Raines, then the post commander at The Dalles, who reported in favor of paying the society the sum of $20,000. On January 28, 1859, the House Committee on Military Affairs also recommended such payment, which was to be in full satisfaction of the claim for the land and also one for $4,000 for the destruction of property upon the claim. The committee state in their report that it appears from the evidence that the society was in the "possession" of the land on August 14, 1848, and that as soon as the danger from Indian hostilities admitted, it endeavored to "reoccupy" the premises, but the United States "troops had ere then taken possession," and included them in the military reservation.

93 The committee seem to have avoided saying that the society was in the occupation of the premises on August 14, 1848, but chose the more indefinite and convenient term "possession." In passing the bill, however, Congress made no declaration on the subject.

This is one of the matters alleged in the answer, which was excepted to as impertinent.

So far as these suits are concerned, it only amounts to this: Upon the ex-parte representations of the defendant, Congress was induced to pay $20,000 in satisfaction of its claim for one-half of the premises and the value of the improvements thereon, whether destroyed by the volunteers under the provisional government, the Indians, or the United States troops, and estimated by it at $4,000.

As has been stated, no reasons were given by Congress for the passage of the act, but in fact various ones may have, and probably did, influence the action of members in favor of the appropriation.

Probably the strongest consideration in its favor was the fact, that although the defendant might not have been in the occupation of the station in August, 1848, still it had maintained a mission there for 9 years prior to September, 1847, during a portion of which time the title to the country was in dispute, and therefore there was a strong equity in favor of its receiving some compensation, in either land or money. Again, the very

fact that the defendant is the representative of a popular and powerful religious organization, for whose good will and favor the average Congressman in Oregon and elsewhere has a lively regard, may not have been without its effect on the result.

But be this as it may, the action of Congress in making provision for the payment of this claim cannot, under the circumstances, have the effect to invest the defendant with the title to the premises. In legal effect, all that was done amounted only to a release by the defendant of its right, if any, to the one-half of the claim occupied by the military, and for damages for the loss or destruction of property, which is not even an admission by the United States, to whom the release was made, that the releasor, the defendant, ever had any right to either, but only that it asserted some kind of claim thereto which it was deemed expedient to satisfy and extinguish. (Bright v. Rochester, 7 Whea., 548; Watkins v. Holman, 15 Pet., 53; Croxall v. Shered, 5 Wal., 287; Merryman v. Bourne, 9 Wal., 600.)

Besides this, one of the plaintiffs and Bigelow, under whom the others claim, had already acquired rights in the premises under the town site and donation acts, which Congress could not deprive them of, even if they had been parties to this proceeding, which resulted in the payment to the defendant. Congress has the power to dispose of the public lands and to make compensation for private property taken for public uses, but it has not judicial power, and therefore cannot finally determine conflicting claims to land, although arising under its own grants or laws.

But since this payment to the defendant of $20,000, there is no longer any cause for regarding it as even morally entitled to anything from the public on account of its missionary operations at The Dalles. In 1847, when the place was abandoned by the defendant, it had no market value, because, there being no white people east of the Cascade Mountains, except the Presbyterian and Roman Catholic missionaries, there were no other purchasers for it; and rather than let it fall into the hands of the latter, it was disposed of to Dr. Whitman for $600. And it appears that he was induced to make the purchase, even at that figure, as much to prevent the "priests" from getting hold of the position as anything else. In 1850, when the claim was taken by the military, it probably could not have been sold with a good title for $1,000, and even as late as 1854, '5, when the town had commenced to grow, the sum paid the defendant by the United States for the one-half of it, was more than double the value of the whole of it.

The conclusion of the court is that the defendant did not occupy the premises on August 14, 1848, as a missionary station or otherwise, either by itself or the American board, and that it was not deterred from so doing by the danger from Indian hostilities, but voluntarily abandoned the same before September 10, 1847, without any intention or expectation of reoccupying it under any circumstances, and therefore the patent therefor to the defendant was wrongfully issued; and the decree of the court will be that the defendant be declared a trustee for the several plaintiffs herein, for so much of the premises described in the patent as is claimed by them in their several suits, and that the defendant, within 90 days, by a sufficient conveyance or conveyances, containing proper covenants against its own acts, to be approved by the master of this court, release to the said

plaintiffs accordingly all right and title to the said premises, and that it pay the plaintiffs their costs and expenses of suit.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

JAMES K. KELLY and A. N. GATES,
For Plaintiffs.

RUFUS MALLORY and JOHN C. CARTWRIGHT,
For the Defendant.

(Endorsed:) Filed December 3, 1879. R. H. Lamson, clerk.

93½ *Complainant's testimony.*

94 Know all men by these presents that I, Winsor D. Bigelow, of the county of Wasco, State of Oregon, in consideration of the sum of two thousand dollars to me in hand, paid by James K. Kelly, of the said county of Wasco, and Aaron E. Waite, of the county of Multnomah, in the State aforesaid (the receipt of which is hereby acknowledged), have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto the said James K. Kelly and Aaron E. Waite, and to their heirs and assigns, certain real estate, situate in the said county of Wasco, to wit, the undivided one-third part of the following described tract of land in sections three (3), four (4), nine (9), and ten (10), in township one (1) north, of range thirteen (13) east, according to the Wilamette meridian. Beginning in section three, at the northwest corner of William C. Laughlin's land claim No. 38, and running thence south along the west boundary of said W. Laughlin's claim, thirty-six and fifty hundredths (36.50) chains to a set post in section three; thence east along said W. C. Laughlin's claim, sixteen and twenty-five hundredths (16.25) chains to a set post in section three; thence south along John A. Simms' land claim, forty-nine and forty-seven hundredths (49.47) to a set post in section ten; thence west seventy-one and two hundredth (71.02) chains to a set
95 post in section nine (9); thence north 32° 30′ east one hundred and one and eighty-two hundredths (101.82) chains to the place of beginning, containing 315.55 acres, more or less, excepting such lots and portions of the said described tract of land as I have heretofore sold and conveyed to other persons. To have and to hold the undivided one-third part of the said described tract of land, with the improvements and appurtenances thereunto belonging (except such portions as have been sold and conveyed heretofore), to the said James K. Kelly and Aaron E. Wait, their heirs and assigns forever.

In witness whereof I, the said Winsor D. Bigelow, have hereunto set my hand and seal this 19th day of December, A. D. 1862.

W. D. BIGELOW. [SEAL.]

Signed, sealed, and delivered in presence of—
O. HUMASON.
JAS. A. ODELL.

STATE OF OREGON,
County of Wasco, ss:

Be it remembered that on the 19th day of December, 1862, before

me, a notary public in and for said county, personally appeared Winsor D. Bigelow, known to me to be the individual described in and who executed the same for the uses and purposes therein mentioned.

96 In witness whereof I have hereunto set my hand and notarial seal the day and year above written.

[L. S.] JAMES A. ODELL,
Notary Public, Oregon.

Filed for record Dec. 19, 1862, at 6 o'clock p. m.

STATE OF OREGON,
Wasco County ss:

I, R. F. Gibons, county clerk in and for said Wasco County, and ex officio clerk of the county court of the State of Oregon for the county of Wasco, do hereby certify that I have compared the foregoing with the original entry in vol. C, pages 169 and 170, of record of deeds of said Wasco County, and that it is a true and correct transcript therefrom of the whole of said original, as the same appears of record at my office and in my custody.

{ COUNTY COURT OF WASCO COUNTY, STATE OF OREGON. } In witness whereof I have hereunto set my hand and affixed the seal of said county court this 30th day of September, A. D. 1879.

R. F. GIBONS, *Clerk.*

97 W. D. Bigelow to Wait & Kelly.—Deed.—Filed for record Dec. 9th, 1864, at 9 o'clock a. m.

This indenture, made this 2d day of December, 1864, between Winsor D. Bigelow, of Wasco County, Oregon, of the first part, and Aaron E. Wait and James K. Kelly, of the second part, witnesseth:

That the said W. D. Bigelow, in consideration of the sum of one thousand dollars to him in hand paid by the said Aaron E. Wait and James K. Kelly, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and quit-claimed, and by these presents doth grant, bargain, sell, remise, release, and forever quit-claim, all his right, title, interest, claim, and demand, as well in possession as in expectancy, in and to the following described real estate, situate in what is known as the Bluff addition to Dalles City, in Wasco County, Oregon, to wit: Lots four (4), in block one (1); lots one (1), two (2), three (3), eleven (11), twelve (12), and thirteen (13), in block two (2); lot one (1), in block three (3); lots eight (8) and eleven (11), in block five (5); lots six (6), nine (9), and twelve (12), in block six (6); lots five (5), eight (8), and eleven (11), in block seven (7); lots two (2), nine (9), and fifteen (15),

98 in block eight (8); lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), and twelve (12), in block ten (10); lots one (1), two (2), and eight (8), in block twelve (12); lots three (3), six (6), seven (7), and ten (10), in block twenty-five (25); lots one (1), four (4), seven (7), and ten (10), in block thirty (30); lots three (3), six (6), nine (9), and twelve (12), in block thirty-one (31), according to the plat of said Bluff addition, together with the privileges and appurtenances thereto belonging, to have and to hold the said described premises unto the said A. E. Wait and James K. Kelly, their heirs and assigns forever.

In witness whereof the said W. D. Bigelow has hereunto set his hand and seal the 2nd day of December, A. D. 1864.

W. D. BIGELOW. [SEAL.]

Signed, sealed, and delivered in presence of—
HOWARD E. TALBOTT.
O. N. DENNY.

[U. S. R. stamp, $1.00. Cancelled.]

STATE OF OREGON,
County of Wasco, ss:

On this 8th day of December, 1864, before me, O. N. Denny, county judge of said county, personally appeared Winsor D. Bigelow, known to me to be the person described in and who executed the foregoing deed, and acknowledged that he had executed the same for the purposes therein set forth.

O. N. DENNY,
County Judge.

99 STATE OF OREGON,
County of Wasco, ss:

I, R. F. Gibons, county clerk in and for said Wasco County, and ex officio clerk of the county court of the State of Oregon for the county of Wasco, do hereby certify that I have compared the foregoing with the original entry in vol. C, page 562, of record of deeds of said Wasco County, and that it is a true and correct transcript therefrom and of the whole of said original as the same appears of record at my office and in my custody.

{ COUNTY COURT, WASCO COUNTY, STATE OF OREGON. } In witness whereof I have hereunto set my hand and affixed the seal of said county court this 2d day of June, A. D. 1879.

R. F. GIBONS, *Clerk.*

99½ And afterwards, to wit, on the 13th day of February, 1880, there was duly filed in said court a stipulation in words and figures as follows, to wit:

100 In the circuit court of the United States for the district of Oregon.

Stipulation.

It is hereby agreed that the bond for costs on the appeal to the Supreme Court of the United States in the following cases, to wit, Dalles City v. The Missionary Society of the Methodist Episcopal Church, def't, and Kelly, Waite, and Humason against the same, and Kelly and Waite against the same, shall be $600 with such sureties as the statutes provide.

Portland, Oregon, Feb. 7, 1880.

JAMES K. KELLY,
Att'y for Defendants.
J. C. CARTWRIGHT,
Att'y for Appellants, the Missionary Society of the M. E. Church.

(Endorsed:) Filed February 13, 1880. R. H. Lamson, clerk.

100½ And afterwards, to wit, on the 13th day of February, 1880, there was duly filed in said court a bond, in words and figures as follows, to wit:

101 *Bond.*

Know all men by these presents that we, E. J. Northrup and D. P Thompson, are held and firmly bound unto James K. Kelly and Aaron E Waite in the full and just sum of six hundred dollars ($600), to be paid to the said James K. Kelly and Aaron E. Waite, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the 13th day of February, A. D. 1880.

Whereas, lately, at a term of the circuit court of the United States for the district of Oregon, held at Portland, in the State of Oregon, in a suit depending in said court between James K. Kelly and Aaron E. Waite, complainants, and the Missionary Society of the Methodist Episcopal Church, defendant, a final decree was rendered against the said defendant, and the said defendant being desirous of removing the said cause by appeal to the Supreme Court of the United States to reverse the said final decree of said circuit court in the aforesaid suit, and a citation directed to said complainants citing and admonishing them to be and appear
102 at a Supreme Court of the United States, to be holden at Washington, on the second Monday of Ocober next:

Now, the condition of the above obligation is such that if the said appellant shall prosecute the said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

E. J. NORTHRUP. [SEAL.]
D. P. THOMPSON. [SEAL.]

Sealed and delivered in presence of—

DISTRICT OF OREGON, *ss:*

E. J. Northrup and D. P. Thompson, each being duly sworn for myself, say I am a resident of and householder in the State of Oregon, and am worth the sum of twelve hundred dollars over and above all debts and liabilities and property exempt from execution.

E. J. NORTHRUP.
D. P. THOMPSON.

Subscribed and sworn to before me this February 13, 1880.

R. H. LAMSON,
Clerk U. S. Circuit Court for Oregon.

Approved.

DEADY, *J.*

(Endorsed:) Filed February 13, 1880. R. H. Lamson, clerk.

3036——4

102½ And afterwards, to wit, on the 16th day of February, 1880, there was issued out of said court a citation, in words and figures as follows, to wit:

103 *Citation.*

The United States of America to James K. Kelly, Aaron E. Waite, greeting:

Whereas the Missionary Society of the Methodist Episcopal Church has lately appealed from a final decree lately rendered in the circuit court of the United States for the district of Oregon, in your favor, and against the said Missionary Society of the Methodist Episcopal Church, to a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, and has given the security required by law: Now, therefore, you are hereby cited and admonished to be and appear at said Supreme Court of the United States on the said second Monday in October next, to show cause, if any there be, why said final decree rendered in your favor, and against the said Missionary Society of the Methodist Episcopal Church, should not be corrected, and why speedy juctice should not be done to the parties in that behalf.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

103½ This is to certify that the within citation was served on me the 16th day of February, 1880, at Portland, Oregon.

I do not, by acknowledging this service, admit the right of the defendant in the within entitled suit to take an appeal to the Supreme Court, because the sum in controversy is not more than $2,000.

JAMES K. KELLY,
One of Pl'ffs & Att'y for A. E. Wait.

Filed February 16, 1880.
[SEAL.] R. H. LAMSON, *Clerk.*

104 *Clerk's certificate.*

In the circuit of the United States for the district of Oregon.

DISTRICT OF OREGON, *ss:*

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing transcript of the papers, pleadings, and orders of court, including the testimony and the opinion of the court, in the cause of James K. Kelly and Aaron E. Wait vs. The Missionary Society of the Methodist Episcopal Church, has been by me compared with the originals thereof constituting the record in said cause, and that it is a correct transcript of the whole thereof as the same appears of record and on file in my office and in my custody; and I further certify that the copy of stipulation and bond on appeal, thereto attached, is a true copy of the original stipulation and bond on file in my office; and I further certify that the citation thereto attached is the original citation issued in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this February 21st, 1880.

[SEAL.] R. H. LAMSON, *Clerk.*

(Indorsement on cover:) No. 208. The Missionary Society of the Methodist Espiscopal Church, appellant, vs. James K. Kelly and Aaron E. Waite. Oregon C. C. U. S. Filed 6th April, 1880.

17-336 + 347

OFFICE SUPREME COURT U.S.
FILED
DEC 9 1882

No. 206.

Supreme Court of the United States.

The Missionary Society of the Methodist Episcopal Church,

APPELLANT,

vs.

DALLES CITY,

APPELLEE.

BRIEF AND ARGUMENT FOR APPELLANT.

E. L. FANCHER,

Of Counsel for Appellant,

229 Broadway, New York.

Supreme Court of the United States.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, *Appellant,*
vs.
DALLES CITY, *Appellee.*

Brief of Appellant, in this and two other causes, argued together.

Appeal from Decree of the Circuit Court of the United States for the District of Oregon.

I.

STATEMENT OF THE CASE.

The Bill of Complaint in this cause was filed by Dalles City, complainant, against The Missionary Society of the Methodist Episcopal Church, defendant, containing the prayer that it be adjudged (p. 16) that the complainant is the owner of a tract of land at the Dalles of the Columbia, in Oregon, in trust for the several use and benefit of the occupants thereof; and that the defendant holds the legal title of the lands in trust for complainant.

The defendant (appellant) received a Patent for the lands from the United States after a full and contested hearing before the Surveyor-General of Oregon, and after appeals to the General Land Office, and to the Department of the Interior; in which proceedings the complainant was one of the contestants.

The Department of the Interior reversed the decisions of the Surveyor-General and Land Office, and decided in favor of the appellant. No new facts were adduced on the hearing of this cause before the Circuit Court that had not been adduced before the Surveyor-General, or were not considered by the Department of the Interior, when the Secretary of the Interior reversed the decisions of the Surveyor-General and the Land Office, and directed that the Patent for the lands be issued to the appellant.

There was a complete review of all the facts by the Secretary of the Interior, when the decision of the Department in favor of the appellant was made. See pp. 89–97. Yet by the decree in this cause, made on the 3d of Dec., 1879, (p. 32,) the Circuit Court, in effect, reverses the decision of the Department of the Interior, and, *per contra*, holds that the land described in the bill of complaint was abandoned by the defendant, (the appellant,) as a missionary station, in September, 1847, and was not thereafter occupied by the defendant as a missionary station or otherwise; and that the same was not confirmed to the defendant (appellant) by the second proviso of section one of the Act of Congress, entitled "An Act to Establish the Territorial Government of Oregon," approved Aug. 14, 1848; also, that the Patent issued to the defendant by the United States on July 9, 1875, was wrongfully issued; that the complainant (Dalles City) is entitled to the Patent for

the lands by virtue of an entry thereof in the proper land office on April 18, 1860, as a town site under the Act of Congress, approved May 23, 1844, in trust for the several use and benefit of the occupants thereof. And it was, therefore, adjudged that the defendant received its Patent as trustee for complainant, and should, within ninety days, convey to the complainant the lands, and all its right, title, and interest which it received by means of said Patent.

The opinion of Deady, *J.*, in support of the decree is contained in the case, pp. 33–44.

The principal question in the case is, whether the land referred to was a missionary station belonging to the appellant, and was occupied by it—The Missionary Society of the Methodist Episcopal Church—as a missionary station at the time of the passage of the Act of Congress to establish the territorial government of Oregon, approved August 14, 1848, within the meaning of the proviso contained in the first section, which reads as follows:

"And provided, also, that the title to the land not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong."

9 *Stat.*, 323, *Brightly's Dig.*, 710.

The Department of the Interior, after a full and careful examination of the whole case, in March, 1875, decided that the land was so held and occupied; reversed the de-

cision of the General Land Office, and awarded the land in question to the appellant. See decision of *Secretary Delano*, pp. 89–97.

Proper surveys were made, and a Patent for the lands was, accordingly, issued to the appellant on the 9th day of July, 1875. See same, pp. 45–48.

To try anew the question thus decided, and to set aside the Patent, Dalles City, as complainant, filed its Bill in Equity in the Circuit Court of the United States for the District of Oregon, (pp. 13–16.)

The Answer of the defendant is found on pp. 19–27; and, after Replication, (p. 29,) the cause was brought to hearing on pleadings and proofs before the Honorable Matthew P. Deady, United States District Judge, presiding.

From his decree above mentioned the Missionary Society of the Methodist Episcopal Church, defendant, appealed to the Supreme Court of the United States.

Appeal allowed, and Citation served, Feb. 16, 1880, (p. 128.)

II.

Assignment of Errors.

The decree is erroneous in these particulars:

In deciding—

(1) That the land described in the bill of complaint was voluntarily abandoned by the defendant as a missionary station in September, 1847.

(2) That it was not thereafter occupied by the defendant as a missionary station or otherwise.

(3) That the same was not confirmed to the defendant by the second proviso of section one of the Act of Congress, entitled "An Act to Establish the Territorial Government of Oregon," approved August 14, 1848.

(4) That the Patent issued to the defendant by the United States on July 9, 1875, for and including the said lands, was wrongfully issued.

(5) That the complainant is entitled to the Patent for the lands by virtue of an entry thereof in the proper land office on April 18, 1860, as a town site, under the Act of Congress approved May 23, 1844, in trust for the several use and benefit of the occupants thereof.

(6) In adjudging that the defendant received its Patent for said lands as trustee for the complainant herein, and that it convey the same accordingly within ninety days.

(7) In adjudging that the defendant pay to the complainant its costs and disbursements herein.

(8) Said decree is further erroneous in not adjudging that the Patent for said lands issued by the United States on July 9, 1875, was legal and valid.

(9) In not adjudging that the bill of complaint herein be dismissed, with costs to be paid by the complainant. And,

(10) In not adjudging that the title to said lands was confirmed and established in the appellant by the first section of the aforesaid Act of Congress, approved August 14, 1848, as a missionary station then occupied and belonging to the appellant as a religious society.

ARGUMENT FOR THE APPELLANT.

FIRST: THE APPELLANT, AS EARLY AS 1836, ESTABLISHED A MISSION STATION AMONG THE INDIANS, AT THE DALLES OF THE COLUMBIA, AND CONTINUED IT, AS SUCH, FOR ELEVEN YEARS AND MORE; DURING WHICH TIME IT ERECTED BUILDINGS AT LARGE COST, INCLOSED AND CULTIVATED A FARM, BROUGHT THERE HORSES AND HORNED CATTLE, AND USED THE SAME FOR THE MISSION AND INDIANS CONNECTED THEREWITH.

The facts proved, show, that the Missionary Society of the Methodist Episcopal Church, a duly organized corporation, (the appellant,) founded a mission among the Flat-Head Indians, at the Dalles of the Columbia, as early as 1836. (Tes. of Rev. Wm. Roberts, pp. 113–117.) That witness testified that "early in the history of their missionary labors they established a station at Wascopam, the place now known as the Dalles."

"In July, 1847, there were stationed at that place the Rev. A. F. Waller and Mr. H. H. Brewer, at an annual expense of nearly $2,000. In August of that year there was a two-story dwelling-house, a school-house, which I think was used as a meeting-house, a store-house, with cellar underneath it, a barn, with farm and farming utensils. There was also moveable property, estimated at over $4,000 in value. The original cost of the establishment, I judge, involved an expense of from $15,000 to $20,000. In this estimate the expense of transporting missionaries around Cape Horn is not included." Also on p. 114 he testified:

"As to the original mission claim, I have to say the mission station which I found at the Dalles in August, 1847, was included in the general area. This mission station thus included was used and occupied in 1847, about as follows: The mission buildings, which I will now, in explanation, say, included a church, a farm of from thirty to forty acres, a landing place near the mouth of the Mission Creek on the Columbia River, which was used as such, and the general pasture grounds which were necessary for the horses and cattle belonging to the mission and the Indians connected therewith."

Rev. Alvan F. Waller, testified, (p. 108,) "that he arrived in Oregon in May, 1840, and soon after commenced preaching to and instructing the Indians, and preached to the white people also, as a missionary under the direction of the Missionary Society of the Methodist Episcopal Church."

"They had one station at the Dalles of the Columbia, known as the Dalles Station, sometimes called 'Wascopam.'"

"The mission was established there in 1836. Witness found it there upon his arrival in Oregon in 1840."

"Witness was appointed to that station in July, 1844, perhaps, and arrived there in the first week in September following. He found Messrs. Perkins and Brewer there with their families—missionaries of said Society whom he superseded—Brewer remaining with him. He found a farm at that place—thirty to forty acres inclosed, and nearly all in cultivation. The premises were so extended during his stay at that station as to include from seventy-five to one hundred acres within the inclosure. The cultivation was intended to embrace over one half of the land

inclosed. There were five buildings at the station when he arrived—one occupied as the residence of the families, one as a church building, school-house, store-house, barn, and a sixth for a work-shop. Witness does not know positively what the expense was. In his judgment the expense of establishing and keeping it up could not have been less than $50,000."

"Witness found connected with the station some forty or fifty head of cattle, which grazed upon grounds claimed by the station and the praries in the vicinity."

To same effect, see testimony of Alanson Hinman, p. 103 of record.)

SECOND: THE MISSION STATION AT THE DALLES WAS NOT ABANDONED BY THE APPELLANT. ON THE CONTRARY, ITS SUPERINTENDENT ARRANGED WITH DR. WHITMAN, AN AGENT OF THE AMERICAN BOARD IN SEPTEMBER, 1847, THAT IT SHOULD CONTINUE TO BE OCCUPIED AND MAINTAINED AS A MISSION STATION FOR THE BENEFIT OF THE INDIANS AT THAT PLACE AND VICINITY.

HIS MURDER, IN NOVEMBER FOLLOWING, AND THE CAYUSE WAR, RENDERED IT UNSAFE FOR THE MISSIONARIES TO REMAIN, AND OCCASIONED A REVERTER TO THE APPELLANT, WHOSE MISSIONARIES RESUMED POSSESSION SO SOON AS IT WAS POSSIBLE TO DO SO.

THE MISSIONARIES OF THE AMERICAN BOARD SURRENDERED BACK, IN WRITING, THE POSSESSION, AND THE METHODIST SUPERINTENDENT ACCEPTED THE SAME IN

FEBRUARY, 1849; AND AS SOON AS IT WAS SAFE, *i. e.*, IN JUNE, 1850, TOOK ACTUAL POSSESSION AND MADE A SURVEY OF THE LANDS.

It was claimed by the contestants before the Surveyor-General of Oregon, that the appellant abandoned the Dalles mission station in September, 1847, on its transfer to Dr. Whitman, one of the missionaries of the American Board. The Surveyor-General so held, and the Land Office followed his decision.

But the Secretary of the Interior reversed that decision, after a careful review of all the facts. (*See record*, pp. 90–94.)

The Committee on Military Affairs of the House of Representatives, held that "there was no room to suppose there was any abandonment." (P. 94.)

But the Court below returns to the same exploded notion of abandonment, and says, (p. 41:) "It" (the appellant,) "had abandoned the place voluntarily and without any expectation or intention of returning, and was no more within the purview or operation of the Act than if it had never been on the ground."

(1) It must be conceded that the Missionary Society of the Methodist Episcopal Church, after the establishment of its mission at the Dalles, in 1836, continued to occupy it as a mission station among the Indians until in September, 1847, when its missionaries made the arrangement with Dr. Whitman, of the American Board, for its further continued occupancy as such mission station. But, strangely enough, that arrangement, and the circumstances attending the occupancy of the station by the missionaries of the American Board from September to November 27, 1847,

are made the ground of the extraordinary assumption of the abandonment of the premises.

The unequivocal testimony of the witnesses competent to speak on the subject, shows that there is no foundation for the assertion that the station was abandoned.

There was no abandonment of the station; and furthermore, the occupancy by an employee of the American Board for two or three months was merely a subordinate and conditional occupancy, which was terminated by a breach of the condition prior to August 14, 1848.

The Rev. W. Roberts was, in 1847, the Superintendent of the Oregon Missions, belonging to the Missionary Society of the Methodist Episcopal Church. His testimony as to the arrangement with Dr. Whitman, of the American Board, is as follows: "In August, 1847, I transferred the said station into the hands of Dr. M. Whitman as the agent of the A. B. C. F. M. The mission station was placed in his hands ON THE CONDITION *and with the understanding* that it *should be occupied* by them *for the use and benefit of the Indians residing at that place and its vicinity.* For the movable property they were to pay such an amount as might be agreed upon mutually. *For the station itself they were to give* NO COMPENSATION, *the understanding being all the while that* THE MISSION WAS TO BE MAINTAINED BY THEM FOR THE USE AND BENEFIT OF THE INDIANS IN A RELIGIOUS POINT OF VIEW, WHICH INCLUDED THE EDUCATION OF THE CHILDREN, THE INSTRUCTION OF THE INDIAN PARENTS, ETC. (*Record*, p. 115.)

Rev. A. F. Waller was interrogated on this point; the questions and answers are as follows:

"*Ques.* You have spoken of a transfer to Dr. Whitman; what were the terms and conditions of said transfer?

"*Answ. The station was transferred to him with the understanding that he should carry on missionary labors at that place as usual.*

"*Ques.* Did he comply with the conditions? and for what reason was it taken back by the Methodist Board?

"*Answ.* He commenced operations there and continued until he was murdered, when it was found that operations could not be continued, and it was THEREFORE retransferred by his co-laborers." (*Record*, p. 111.)

Now here is evidence that is positive, and comes from the only living witnesses competent to testify, of their personal knowledge, on the question, and it shows, beyond doubt, first, that the station was not abandoned at all; and, secondly, that the possession of it was transferred to the agent of the American Board of Commissioners for Foreign Missions *upon the express condition* that it should be occupied for missionary operations among the Indians as usual. This is a most important fact in its bearing upon the claim in this case of the Methodist Missionary Society, and can no more be disregarded or denied than any other important fact which is established in the case. It will be seen that both Societies—the Methodist and the American Board—have never misunderstood the matter, but have continually acted with reference to this arrangement; and the rights which result from it are as much the property of the Methodist Missionary Society as were at any time the cattle or the buildings which it placed on the station. No compensation was asked for the station, though its buildings were worth $20,000.

The Surveyor-General, referring to this condition, says: "Upon a failure to comply with any such understanding or undertaking, there was no condition of forfeiture or re-

entry contained in the transfer." It may be replied to that remark, that the transfer was verbal, and was made by the Rev. W. Roberts, the Methodist Superintendent, who positively swears that the transfer did contain and was accompained by the condition that the station should be occupied for missionary operations among the Indians; and the provision for re-entry, which the Surveyor-General says was wanting, was a natural and legal qualification *implied* from the condition, and was not necessary to be expressed. No one can fail to see that the occupation by the employees of the American Board was intended to continue the station, as a mission station, and was, for that purpose, explicitly qualified by an express condition reasonable in its nature. The evidence establishes the condition above repeated. The testimony of the Rev. W. Roberts further shows, that Dr. Whitman drew a draft on the American Board for "a fraction over six hundred dollars," (foot of pp. 118, 119,) for the *price of the movable* property delivered to him. This draft was never presented or paid, but was surrendered by the Methodist Missionary Society to the American Board. Why? Because, as the evidence shows, of the breach of the above-mentioned condition, of the destruction of the property, and of the consequent reverter of the station, to the Methodist Missionary Society. (*Record*, p. 119.)

The *condition* is thus conclusively established; and the evidence further conclusively shows there was a breach of the condition in the latter part of the month of November, 1847, at, or shortly after, the time of the murder of Dr. Whitman; when the missionaries of the American Board left the station, which was only some two or three months from the time the condition was made. And it will fur-

ther appear from the evidence, that the Societies and their agents have ever since then acted in full view of, and with express reference to, the condition and the breach of it; the American Board for that reason renouncing all claim to the station in favor of the Methodist Missionary Society.

(2) The evidence demonstrates, that immediately upon the murder of Dr. Whitman, the hostilities of the Indians rendered it unsafe and improper for the missionaries to remain at the Dalles. Alanson Hinman, who had been employed by Dr. Whitman to attend to the farm there, thus testifies: (*Record*, p. 104.)

"*Ques.* State why you left the Dalles Mission when you did?

"*Ans.* Because he thought the Indians would get his scalp, if he stayed longer.

"*Ques.* State the circumstances under which you left?

"*Ans.* He was at Vancouver for medicine for the Indians, and heard read the dispatches from Walla Walla, by which he learned that Dr. Whitman and many of the immigrants had been murdered by the Indians, and that there were three parties of Indians leaving, or about to leave—one for Dr. Whitman's saw-mill; one for Clearwater, Mr. Spaulding's station; and the other for the Dalles—to kill all the Americans residing at the different places mentioned."

This witness then speaks of hostile and armed Indians painted for war, (p. 105,) whom he himself saw at the Dalles, and of the duplicity of a band of Indians who, at first, promised him assistance and protection, but who afterward declined to fulfill their promises, assigning as a reason, that if they complied "they themselves would be killed."

Perrin Whitman and A. Hinman, while at the Dalles, conversing about the murder of Dr. Whitman, and of the report that a party of hostile Indians were at the Deschutes, 20 miles off, on their way to the Dalles, looked out of the window and "saw five Indians mounted, armed and painted, approaching the house," (p. 104.) After many hostile demonstrations they left, driving off several head of horses. Witness thinks his having put his hand in a position to use fire-arms saved him from attack, (p. 105.) In September, 1847, (after the arrangement with Dr. Whitman, p. 120,) the Rev. W. Roberts saw two men killed at the Dalles and several others wounded, (foot of p. 119.) Yet says Deady, *J.*, (p. 40,) "There never were any Indian hostilities at the Dalles or within 100 miles of the place." (!)

The breach of the condition, and the action of the Societies and their agents in consequence thereof, are further shown in the following extracts from the evidence. The Rev. W. Roberts thus testified:

"*Ques.* State the reasons, as you understood them at the time, for the retransfer of the Dalles station, (p. 124.)

"*Ans.* The missionaries of the American Board found *themselves unable to fulfill the conditions of the original transfer* on account of Indian hostilities, and the destruction of their other missions; and believing the Dalles station to include very valuable property, which of right belonged to us, in the most Christian-like manner they returned it to its original owners."

By the testimony of the Rev. Alvan F. Waller (of the Methodist mission) it appears, that he "arrived in Oregon in May, 1840, and soon after commenced preaching to and instructing the Indians." He states that the Missionary Society of the Methodist Episcopal Church "had one sta-

tion at the Dalles of the Columbia, known as the 'Dalles station,' sometimes called 'Wascopam;' he found it there upon his arrival in 1840; he was appointed to that station in July, 1844, and arrived there in September following."

He then testified as follows: (p. 109 of *Record.*)

"About the first of September, 1847, there was a skirmish between the Indians and a company of emigrants near our premises, in which one white man was killed and an Indian chief, and also two white men and one Indian wounded. Some ten or eleven weeks afterward Dr. Whitman was murdered by the Cayuse Indians, as also some ten or a dozen others, upon which ensued the Cayuse war. During that war some of our property was destroyed, including some $200 worth of his own property." He then states his opinion, that between the time of the massacre of Dr. Whitman and June, 1850, "there was no time when a Protestant mission could have been carried on with safety" at the Dalles station. Dr. Roberts says it was with difficulty he, in 1850, remained there one week, (p. 124 and p. 116.) There was no time between the murder of Dr. Whitman and 1850 when a mission could have been carried on at the Dalles. "Mr. Waller, early in the Cayuse war, saw an order over the signature of H. A. G. Lee, Superintendent of Indian Affairs under the provisional government, and who was also an officer in the army of the provisional government in said war, ordering all missionaries out of the country, (p. 110.) Rev. W. Roberts saw the same order, (p. 116.)

This order, or warning, was published in a newspaper, and is in evidence, (pp. 100–101;) and, with the disturbed state of the country, furnish the reasons why the Dalles station was not re-occupied by the Methodist missionaries

from the breaking out of the Cayuse war, when the whites fled from the place in fear of their lives, until the year 1849 or 1850. So soon as it was safe or practicable to move in the matter, steps were taken to re-invest the Methodist Missionary Society with the documentary right and title of the Dalles station, although it already had the right in law and equity to re-enter; and attempts were also made to resume missionary operations at the Dalles station by that Society through its missionaries. In brief, the facts are these:

(3) The American Board, having failed to keep the condition on which their occupancy depended, it appears that in February, 1849, E. Walker, H. H. Spaulding, and C. Eels, three of their missionaries, delivered a written paper to the Rev. William Roberts, Superintendent of the Methodist Missions in Oregon, wherein they "offer for his acceptance the Mission station at Wascopam, near the Grand Dalles of the Columbia River," and "propose that it be re-transferred to the Oregon Mission of the Methodist Episcopal Church in the same manner in which it was received by the Oregon Mission of the American Board of Commissioners for Foreign Missions," (pp. 115, 126.) No doubt these missionaries acted under instructions of the Board at home; and this circumstance, together with the fact that, during the Cayuse war, it was unsafe to be at the Dalles, shows there was no occasion for earlier action in the matter, and accounts for the happening of the interval between the breach of the condition and this proposition. The time, however, from November, 1847, to February, 1849, was while no missionaries were allowed at the station. (pp. 116, 121.)

The Rev. A. F. Waller, in this connection, testified, that

Dr. Whitman "commenced operations there, and continued until he was murdered; *when it was found that operations could not be continued, and it was therefore retransferred by his co-laborers.*" (*Record*, p. 111.)

Mr. Waller and Josiah L. Parish, in their joint affidavit, state "that on the 14th of August, 1848, said missionary station was occupied by the soldiers in actual service in the Cayuse war, (p. 101;) but said Missionary Society of the Methodist Episcopal Church has always, since said conditional transfer, and particularly on the 14th of August, 1848, claimed the legal right of occupancy of said Dalles station." This affidavit was filed in the Land Office at Oregon City, and was a part of the evidence in this case before the Surveyor-General, and before the Circuit Court, (p. 30.)

On the 28th of February, 1859, the American Board executed and delivered to the Missionary Society of the Methodist Episcopal Church a quit-claim and release of all their right, title, interest, and claim in or to the land and other property at the Dalles, on the Columbia River, known as "the Mission Property," and declared therein as follows: "*This Release being made to quiet any doubts as to the title of the said Board of Managers*" of the Missionary Society of the Methodist Episcopal Church. The very form of this release, and the declaration contained in it, are good evidence that the American Board had no right or claim to the mission station, but understood that such right and claim belonged to the Methodist Missionary Society. (See the *Release*, p. 97 of *Record*.)

The Rev. W. Roberts, (Superintendent of Methodist Missions in Oregon,) testifies that he received the above-mentioned written proposition from E. Walker, H. H.

Spaulding, and C. Eels, and says: "To this proposition I returned an answer in writing; *after which I took charge of the station while I remained Superintendent of the Board. This took place some time in February*, 1849." It was neither necessary nor prudent for this Superintendent to take an earlier step in the matter.

He further states in his deposition, that "in June, 1850, *the same being as early after the 'Cayuse war' as I judged to be safe to occupy the station*, I went to the Dalles to survey it, carrying with me a compass and chain. Finding there Justice Cheeseworth, a surveyor, I employed him to survey the claim, Rev. A. F. Waller, Dr. Waller, and myself carrying the chain," (p. 113.)

The evidence clearly establishes that some ten or eleven weeks after the murder of two persons at the Dalles in September, 1847, Dr. Whitman and some ten or a dozen others were murdered; and that from the time of those murders, when the Cayuse war broke out, (p. 112,) down to the year 1850, it was neither prudent nor safe for the missionaries to remain at, or to return to, the Dalles station, or to attempt to carry on missionary operations there, (p. 116.) Messrs. Roberts and Waller both testify to this fact, and there is other corroborating evidence to the same effect. Because the missionaries did not carry on their usual operations at the Dalles during the *interregnum* from November 1847 to 1850, is of itself no evidence whatever that they had abandoned the mission. When war compels men to remain absent from their homes or their possessions, it would be a peculiar logic that supported the conclusion of a voluntary abandonment. Something besides the mere fact of absence must be shown in support of such a conclusion, especially if the parties concerned allege the cause of

their absence to be the pending hostilities, and support their allegation, as the missionaries in this case have done, by abundant proof of the existence of such hostilities.

In May, 1851, the Methodist missionaries attempted further to resume missionary operations at the Dalles, but the military commandant of the post prevented them from doing so.

Major Rains, in his report to the Secretary of War, has, no doubt, suggested the true reason why this military commandant refused to allow the Methodist missionaries to resume their work at the Dalles. The commandant was a Catholic, and this was a Protestant mission.

The Surveyor-General of Oregon strangely concludes, "that the Missionary Society of the Methodist Episcopal Church, in September, 1847, irrevocably abandoned the possession of the Dalles station," and the learned Judge at the Circuit so held, (p. 41.)

Without any order of the Board of Managers of the Society to indicate any such intention, and in face of the inexplicable facts that its Superintendent expressly affixed the above-mentioned *condition* to the permissive occupancy of Dr. Whitman and his co-laborers, and that both Societies have ratified and acted upon the validity and effect of that condition, such a conclusion would seem to be sufficiently refuted. But how does it appear in the face of the other surrounding circumstances important to be considered? Look at that establishment at the Dalles as it existed in September, 1847! There were buildings and improvements that had cost the Methodist Missionary Society not less than fifteen or twenty thousand dollars, not including transportation of missionaries around Cape Horn. There was a farm inclosed and cultivated of from

seventy-five to one hundred acres, besides a vast plateau used for grazing cattle. There was a landing on the Columbia, in constant use, with a church, school-house, storehouse, farming utensils, shops, and appurtenances. There, in the language of a witness, was "the key to that entire region." To gain that position for missionary operations among the Indians, the Society's Board of Managers at home had devoted years of anxiety and care, and expended many thousands of treasure. Its missionaries had been the pioneers to that field of distant and dangerous service; had braved the perils of the wilderness, and endured exile from civilized communities for an abode among savages, and had been maintained there for more than a decade. They had led the way for the white population to the valley of the Columbia, and were the first to introduce agriculture, horned cattle, and the arts of civilized life into that territory. They had established a flourishing mission at the Dalles, and entertaining a "Christian regard and confidence" for their co-laborers from the American Board, and being willing that they should, by their missionaries, assist in giving effect to the objects of the enterprise by a continuance of the missionary operations thus laboriously and successfully begun and carried on, they, in order to continue the work, arranged with Dr. Whitman and his associates, as missionaries of the American Board, to occupy the mission property, but at the same time imposed the express condition that they should continue missionary operations there for the benefit of the Indians; the effect of which was, that they should remain there no longer than during such time as the objects of the mission were pursued.

All this neither indicated nor amounted to an abandonment.

It would have been strange if the Methodist missionaries had, in September, 1847, "voluntarily abandoned" the Dalles station after the expenditure of so much cost and sacrifice in establishing it; still more strange that they provided for *continuing the mission*, and thereby *for the termination of the permissive occupancy of Dr. Whitman and his associates, if, while imposing that condition, they did not intend to continue the station, and to resume the occupancy on failure of the condition.* (See p. 101.)

The Methodist missionaries themselves, on their oaths, say that they returned to the Dalles station with the intention of resuming their missionary work there so soon as they deemed it safe and practicable; and that "the station was not abandoned," using that express language, (p. 120) [306.] Does it lie within the province of the Court below to ignore these facts, and these sworn declarations before him, and to assume against this evidence that there was an abandonment? Certainly the case shows there was both "*the right*," as well as the intention, to re-occupy the station after September, 1847; and so soon as they found it safe they attended at the station to resume its occupancy, (pp. 101, 113.)

It has often been decided in regard to leases, and the same principle has been repeatedly applied between vendor and vendee in construing articles for the sale of land, that "the happening of the cause of forfeiture renders the lease void as to the lessee." (*Clark vs. Jones*, 1 *Denio's Rep.*, 519; *Canfield vs. Wescott*, 5 *Cowen's Rep.*, 270, *and cases there cited.* Besides, there is, bearing upon this point, a letter annexed to Major Rain's report, and filed in the office of the Secretary of War, which was written and sent by the Secretary of the American Board to the Sec-

retary of the Methodist Missionary Society, and which evinces the understanding between these Societies as to the right of the Methodist Missionary Society to re-occupy the Dalles station.

The surrendered draft, heretofore referred to, was drawn by Dr. Whitman on the American Board, in favor of the Missionary Society of the Methodist Episcopal Church, at the time Dr. Whitman took possession of the station at the Dalles; and the object of the draft was to pay for certain movable property at the station, which was transferred with it to Dr. Whitman's possession. Now, why was it that this draft was never presented for payment to the American Board, nor paid by it? It has never repudiated any of its obligations. No reason can be suggested why it was not, save the significant one growing out of the condition before mentioned as to the permissive conditional occupancy by the American Board, and the circumstances that prevented the fulfillment of the condition when Dr. Whitman was murdered, and his co-laborers fled from the station.

The condition on which the right of occupancy of the station by the missionaries of the American Board depended was known both to it and to the Methodist Board; and, before the draft matured, both Boards had been informed of the *breach of the condition*, and of the consequent reverter of the station to the Methodist Missionary Society; and, inasmuch as the latter Society intended, and had the right, to resume possession of their station and property at the Dalles, they surrendered the draft. If they did not intend to resume possession, and did not understand that the property had reverted to them, can any one rationally suppose they would have surrendered the draft? If the

transfer of the property had been absolute, the draft would have been collected.

It is clear that the Methodist Missionary Society had the *right* to re-occupy the Dalles mission immediately after November, 1847, when the American Board ceased to keep up missionary operations there. No one has ventured an opinion contrary to this proposition; and, according to the principles upon which courts of judicature proceed in determining such questions, it is not to be denied, under the facts of this case, that, had the Methodist missionaries returned to the Dalles station in December, 1847, when the missionaries of the American Board had ceased operations there, they would have had all lawful and equitable right to resume and retain the occupancy of the station. And the American Board always admitted that right. Nor is it material that the agreement as to the occupancy contained no clause of re-entry coupled with the condition. Numerous leases, agreements, and deeds, upon condition, have not contained clauses of re-entry, yet the *right* of re-entry has never been doubted where there was a breach of the condition.

Now it is quite certain that no reason whatever can be assigned for the express condition testified to by Rev. W. Roberts, unless it was to retain the right, and to indicate the intention, of re-entry on breach of the condition. *It was idle and unmeaning if this were not its purpose and effect;* and had the Methodist superintendent surrendered the occupancy of the station to the missionaries of the American Board, without qualifying their permissive occupancy by such a condition, the proceeding would have been inexplicable on any rational view of the transaction.

From the facts in the case it is manifest that the occu-

pation of the Dalles station by the missionaries of the American Board from September to November 27, 1847—a period of two or three months—was merely a derivative and subordinate occupation, occasioned solely by the consent of the Methodist Superintendent, and was put an end to by the breach of the above mentioned condition; and, so far as the question now under consideration is concerned, must justly be regarded *as the occupancy of the Methodist Missionary Society itself*. It was only by the permission of its Superintendent that those missionaries were there at all. It was equally by the force and effect of the condition imposed by the Methodist Superintendent that such derivative and subordinate occupation was terminated; and then, surely, the right of the Methodist Missionary Society to resume and retain the occupation became absolute.

There has never been any dispute or difference between the Societies themselves concerning the character of the occupancy of the Dalles station under the arrangement with Dr. Whitman; nor concerning the right of re-occupancy vested in the Methodist Society.

In this respect the Secretary of the Interior well remarked, (p. 95:) "If the land was occupied as a missionary station at the date of the passage of the Act, title is confirmed. If so occupied it is immaterial whether by the American Board or the Methodist Society, as the former have acknowleged the superior claim of the latter, and have released all right or interest they might have had or acquired in the land to the latter. There is, therefore, practically but one claim."

THIRD: CONGRESS INTENDED TO GRANT SIX HUNDRED AND FORTY ACRES AT EACH MISSIONARY STATION TO THE SOCIETIES TO WHICH THE SAME BELONGED, AND THERE WAS SUCH AN OCCUPANCY BY THE APPELLANT OF THE DALLES STATION ON THE 14TH OF AUGUST, 1848, AS IS CONTEMPLATED BY THE ACT OF CONGRESS OF THAT DATE.

In that Act it is provided "*that the title to the lands, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes of said territory, together with the improvements thereon, be confirmed and established in the several Religious Societies to which said missionary stations respectively belong.*

The public history of the country, prior to the passage of the Act, sheds light upon the purpose and meaning of the proviso just quoted.

Although the coast of Oregon had been seen by various navigators, its history may be said to have commenced when Captain Robert Gray, in the American ship "Columbia," from Boston, May 7, 1792, entered the mouth of the great river of the West and gave the name of his vessel to the river.

American statesmen became desirous to secure it, and its valley, for the Union.

This desire led the administration of Jefferson to send an exploring expedition, under command of Captains Lewis and Clark across the continent in 1804–5. The expedition collected much valuable information as to the extensive districts of the country, and gave the Americans additional claim to the country.

In 1808 the Missouri Fur Company sent trappers and traders to Oregon.

In 1811, the American Fur Company, of which John Jacob Astor was the leading member, established a trading post at the mouth of the Columbia River, and called it "Astoria;" but it was very soon sold to the North-west Fur Company to save it from being taken during the war. (One authority says it was given up to the English through the treachery of the manager in charge, 3 *John. Cy.*, 985.)

The Hudson's Bay Company employed many Canadians among its trappers; and these, for a long time, constituted the main body of the white population. Most of them took Indian wives and were the fathers of numerous half-breed children.

The North-west and the Hudson's Bay Company, *were both English associations.* For awhile they were separate, but afterward were united.

They were largely engaged in trapping and trading, and kept many traders and trappers in Oregon. It was only in 1860 that their trading post at Fort Vancouver, on the Columbia, was abandoned.

There was a treaty concluded in 1818, between the United States and Great Britain, which the latter called a "treaty of joint occupation;" and under it Great Britain attempted to claim territory as far south as the Columbia River, and below it; but finally offered to compromise on the Columbia. (3 *John, Cy.*, 985.)

Because of this claim of Great Britain under the treaty of 1818, the settlement of the country by Americans became a matter of importance to the United States.

In 1832 the first settlers from the United States arrived in Oregon.

In 1834 the missionary colony, led by Dr. Marcus Whitman and Rev. Mr. Spaulding entered Oregon.

The missionaries of the Missionary Society of the Methodist Episcopal Church followed soon after, and founded several missions there. The one at the Dalles had been in efficient operation for ten years, when the treaty of 1846, between the United States and Great Britain was agreed to, by which latitude 49 degrees was made the division line.

Previous to that treaty, to wit, in 1843, a provisional government for Oregon was formed with its capital at Oregon City.

The name of Oregon was applied to a vast country on the Pacific coast, extending from latitude 42 degrees to 54 degrees 40 minutes north; but by the treaty of 1846, the United States abandoned all claim to the country north of latitude 49 degrees. (*See Am. Cy.*, vol. 12, p. 559.)

Such was the general history of the country when the Act of August 14, 1848, erecting the territorial government of Oregon was passed.

The "donation law" was not passed by Congress until 1850. It gave 320 acres of unappropriated land to each male person who should settle thereon prior to December 1, of that year; and 320 acres to his wife.

To those who should settle between December 1, 1850, and December 1, 1853, it gave 160 acres to each man, and 160 acres to his wife. It was a condition of these grants that the settlers should reside on the land for four years.

Here, then, is discovered the reason why Congress in- [illegible] by the Act of August 14, 1848, to confirm title to

640 acres in the Missionary Societies who at that time had stations in the Territory. Great benefit had been conferred on the nation by the missionary settlements. Doubtless the treaty of 1846 would have marked a different division line between the United States and Great Britain, had not those missionary settlements existed. They attracted thither the tide of American settlers.

If a single settler was thought to be of such importance in 1850, as, with his wife, to be rewarded with 640 acres of land, surely it was not an undue recognition of the importance of a mission station, of ten years duration, to confirm in the Society which had maintained the station the title to the lands of the station not exceeding 640 acres.

(See remarks of Secretary of Interior, foot of p. 90, *et seq.*, as to the importance of the settlement of Oregon, by American emigrants.)

It is clear, on the following grounds, that the Methodist Missionary Society is within the spirit and meaning of the provision already quoted.

(1) What is the meaning of the term "occupied" as used in this provision of the Act? Does it mean any thing so limited as the Court below supposed, (p. 41,) when it held that "it means to possess by having hold of, or being actually upon, the thing possessed, continuously and exclusively?" And, "therefore," (say the Court,) "there can be no such thing as constructive occupancy!" Surely the Act was incorrectly construed. Its language means *a right of occupancy*. If A is the tenant of a farm, we commonly designate it as the farm "now occupied" by A. Suppose his actual occupancy should be suspended by his removal to a city to pass the winter, or by his being absent

from fear of Indian hostilities, or by the presence of a military force which deprives him of actual possession for the time being; does not common usage sanction the employment of such terms as "the farm now occupied by A," when reference is made to it?

(2) But there is more in this provision. It declares that "the title to the lands, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes of said Territory, together with the improvements thereon, be confirmed," etc. That is to say, wherever among the Indian tribes of the Territory any land is *occupied as missionary stations*, the title thereto is confirmed, etc. Observe, the language is not "now actually occupied by missionaries," but "*occupied as missionary stations*;" in the same sense as a spot may be occupied as a depot or as a seminary or college. The intention evidently was, to confer the legal title of the lands on the Societies which, till then, had only an imperfect one, by reason of their possessory claim to the mission stations.

(3) There is still more in the language of the Act to indicate its meaning: "confirmed and established *in the several religious societies to which said missionary stations respectively belong*." Now, did not the Dalles missionary station then belong to the Missionary Society of the Methodist Episcopal Church? It did, so far as any such station in the Territory belonged to any Society. No Society had a perfect *title* to the land until this Act was passed; yet the missionary stations within the Territory were, in ordinary language, spoken of and designated each as belonging to the particular religious society which had established it and occupied it as such. And a temporary interruption of occupation, from causes beyond the

control of the religious society, such as Indian hostilities or military interference, would not have rendered the expression "now occupied as missionary stations" inappropriate.

To contend for the literal meaning of every word found in the Act under consideration, would be to nullify its obvious intent. No society could make out, in the strict, literal sense of the word, that any mission station absolutely "*belonged*" to it within the Territory of Oregon. The absolute owner was the United States, to which, in the strict sense of the word, all the stations in the Territory belonged. Until this Act was passed, the title to all the land in the Territory was in the United States. The term or phrase "to which said missionary stations respectively belong," must, therefore, mean something different from what a literal and technical definition implies, and the phrase obviously must have been used in its popular sense to indicate the societies which had established and occupied the mission stations.

The language is to be understood according to its obvious intent and common acceptation, and is not to be limited to such a technical and restricted sense as the Court below has attached to it. Such occupancy was not abandoned so as to be left open to "the next comer," as that Court erroneously held, (p. 41.)

(4) Still further; the title to the lands "with the improvements thereon," is confirmed and established. Whose were the improvements on the Dalles missionary station at this time, but those of the Methodist Missionary Society? That Society had put them there at its own expense; its title to the ownership of them on August 14, 1848, had never been questioned; what temporary

right to the use of those improvements the American Board had previously possessed had been forfeited by breach of the condition attached to their possession; and no one at that time could, possibly, have successfully disputed that the Dalles missionary station, and the improvements upon it, belonged to the Missionary Society of the Methodist Episcopal Church. No whisper of any other owner or rightful occupant could then have been heard, though the remembrance of the recent massacre of Dr. Whitman, and the fear of the Indian's scalping-knife, as well as the warning of Major Lee, interposed to prevent the missionaries of that Society from enjoying the actual *pedes possessio* of the mission station and improvements which then belonged to it.

(5) Notwithstanding there was an absence of an actual occupation *by its missionaries*, there was, in contemplation of law, and, as is respectfully submitted, in contemplation of the provision and purpose of the Act of August 14, 1848, an occupancy of the Dalles station at that time by *the Missionary Society of the Methodist Episcopal Church*. The actual presence of its missionaries at the spot was made both dangerous and improper, if not impossible, from November 27, 1847, until long after the passage of the Act referred to: for the evidence in this case establishes the fact, that from the breaking out of the Cayuse war, at the time Dr. Whitman and other whites were murdered by the Indians, it was not safe for the missionaries to be at that station; and that the Methodist missionaries so believed. Armed bands of men might have been able to defend themselves there; Mr. Olney, who married a squaw, might have continued there, and, for reasons not necessary to specify, Catholics might perhaps

have remained there unmolested; but Protestant missionaries would, as the evidence clearly shows, have been likely to have met the fate of Dr. Whitman had they attempted at that time to brave the hazards of the treachery and hostility of the Indians.

(6) Now, is it possible that this cause of danger was not a sufficient excuse for the absence of the missionaries from the station on the 14th of August, 1848? And can it be contended that the rights of the Methodist Missionary Society in the property so long possessed by it at the Dalles, and acquired at such cost and sacrifice, were forfeited by this forced and justifiable absence of its missionaries? In the case of *The United States vs. Maca, et al.*, 18 *Howard's Reports*, 556, there was a *condition*, that within four months a map of the land should be made. The Supreme Court of the United States said: "But as the claimant was hindered from performing it, by the revolutionary state of the country, the non-fulfillment of it will not work a forfeiture of his title." The same Court, in the case of *The United States vs. Reading*, *Ibid.*, p. 1, held that the omission of certain acts, in the nature of a condition, might subject the title of the claimant to be denounced; but, unless the supreme government had actually done so, the omission would not work a forfeiture of the title to the lands.

Within the principle of these decisions the Methodist Missionary Society may safely stand.

(7) But it further appears in this case, (pp. 100, 101,) that, in a public newspaper published in Oregon, called the "Ogreon Spectator," dated Thursday, July 13, 1848, certain letters, written by Major H. A. G. Lee, Superintendent of Indian Affairs, were made public. In one of these, dated

Fort Wascopam, June 15, 1848, he, among other things, states: "As Superintendent of Indian Affairs it becomes my duty to inform you, with all due respect to your sacred calling, that it is desirable no further missionary effort should be made with any Indians east of the Cascade Mountains until the presence of well-organized and disciplined troops, under command of the United States officers, shall render such efforts safe and judicious. At present the relations between the whites and Indians are too precarious to allow missionary labors with the Indians to be either prudent or effective of good. So soon as circumstances will allow, I shall take much pleasure in throwing wide the door of missionary labor among the natives to all Christian missionaries; at present, prudence demands that it should be closed against all," (p. 101.)

Rev. W. Roberts saw that notification; and he also received himself "a letter from the military at the Dalles upon the subject," (*Record*, p. 116,) [296,] (also p. 119.)

Rev. A. F. Waller also saw the published notification of Lee, "early in the Cayuse war," (p. 110.)

In another of these letters, dated Oregon City, June 24, 1848, Superintendent Lee further remarks: "Permit me to intrude a little further, and say, for the information of all concerned, that it is desirable that the peace of the country should not be endangered by missionaries exposing themselves to the fate of our esteemed and lamented friends at Wilatpu."

The Methodist missionaries, who had retired to their stations west of the Cascades, testify that they saw this warning early in the Cayuse war. They knew, also, that armed Indians, painted for war, had appeared at the Dalles, and carried away some of the mission property. That the

missionaries heeded the warning of Major Lee, and were influenced by a salutary fear of the Indians, and of respect for the military authorities, and therefore remained absent from the Dalles until they judged it safe and prudent to return there, was certainly very justifiable, prudent, and praiseworthy; and, it should seem, ought to be ascribed to a different motive, and to be justified by a different reason than such as are suggested by the Court below, to the effect that they had abandoned the Dalles station, and had no right or intention of returning. The Methodist Missionary Society had the right, upon the well-proven facts of this case, to say that its missionaries were temporarily absent from the Dalles station at the date of the passage of the Act of Congress on the 14th of August, 1848, for the sufficient reasons that the disturbed state of the country, the prevalence of Indian hostilities, the occupancy of the station at the time by the United States military, the warning of Major Lee, and the prudence of reasonable men, compelled them, for the time, to remain temporarily absent from that station; and further, to claim that notwithstanding such temporary absence, it was the occupant of that station at that time.

(8) It is an established rule in the exposition of statutes that the *intention* of the lawgiver is to be considered in deducing their meaning; hence, it is said by jurists that "the real intention, when accurately ascertained, will prevail over the literal sense of terms." (*Kent's Comm.* [461,] 510.) "*Scire legis, non hoc est verba earum tenere, sed vim ac potestatem.*" The reason and intention will often control the strict letter. Now, what was the *intention* of Congress in respect of the act in question? Why did the lawgivers insert in the Act the provision above quoted, in

favor of those religious societies who occupied missionary stations in the territory of Oregon? The Surveyor-General argues, it was because they were preaching the Gospel to the Indians. But surely he has missed the mark, praiseworthy as such preaching may be. Clearly the intention was to recognize and reward the services of such societies for having been the pioneers of American civilization to that wilderness; for having attracted to the localities of their stations the tides of population from the United States; for having prepared the way for the organization of the territorial government, and for having, by those means, contributed toward the development of the country's resources and the enlargement of its area.

The Missionary Society of the Methodist Episcopal Church was the first to lead the way to the fertile valleys of the Willamette and the Columbia. An indomitable missionary zeal was undoubtedly the moving cause; but it is no less true that, incidentally, the Society and its missionaries contributed largely to constitute the vast foundations of states in that western land. The history of the dawn of civilization in Oregon is identified with the efforts, expenditures, and sacrifices of that Society and its devoted missionaries. With these facts in view, can any one read the language of the Act in question, and conclude that the intention of its framers would be well subserved by permitting a Catholic religious society to become the owners of six hundred and forty acres near the Dalles, whose missionaries had occupied a station there for only a few weeks, while, at the same time, a Protestant religious society, whose missionaries had first penetrated the wilderness and had established and, for not less than ten years, maintained a successful missionary station among the Indians there,

must not be considered as among the beneficiaries for whom the Act was intended to provide? The conclusion is irresistible, and the Court below, in considering the case, must have lost sight of this fundamental principle applicable to it.

FOURTH: THE GOVERNMENT OF THE UNITED STATES HAVE, ON FULL INFORMATION AND CONSIDERATION OF THE FACTS OF THE CASE, ADMITTED THE VALIDITY OF THE CLAIM OF THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH TO THE DALLES MISSION STATION, AND AT THIS DAY THE GOVERNMENT HOLD A PORTION OF THE LAND UNDER A TITLE DERIVED FROM THAT SOCIETY BY A RELEASE TO THE UNITED STATES MADE IN 1860.

As before observed, the United States troops took possession of the mission buildings at the Dalles in the Cayuse war, and held such possession at the date of the passage of the Act of August 14, 1848, and until the spring of 1849. In March of 1850 Major Tucker, with two companies of riflemen, took possession of the station, located a military fort there, destroyed the houses, store, and barn belonging to the mission, and in the same year a military reserve of ten miles square, embracing the land in question, was established by order of the President. That reserve was, under orders issued from the War Department in 1854, reduced to three hundred and fifty-three and a fraction acres of land, (p. 46, 31, 61, 92.)

The Missionary Society of the Methodist Episcopal Church then applied for compensation for the land thus taken and the buildings thus destroyed, *founding its claim on the title of the Society, confirmed and established in said Society, in and by the said Act of August* 14, 1848, (p. 93.)

The Secretary of War, after investigating and approving the claim, made a communication to Congress on the subject, and accompanied it with the papers in the case. The matter was referred to the Committee on Military Affairs in the House of Representatives, who, January 28, 1859, made a report in favor of the claim. In that report the Committee, among other things, state, "The Committee has examined with great care, the voluminous papers accompanying the communication of the Secretary of War, and find that the following facts are satisfactorily established." The committee then advert to the facts, and among them to the transfer of possession to the American Board "upon the express condition" above referred to, and proceed as follows:

"The Committee has no doubt, from the evidence adduced, that the Missionary Society of the Methodist Episcopal Church *was in possession of this land on the 14th of August*, 1848, *within the meaning of the Act passed on that day, and that the title was thereby 'confirmed and established.'* As soon as the danger of Indian hostilities admitted, the Society endeavored to re-occupy their buildings and lands, but the troops had, ere then, taken possession and permanently located their military establishment. *There is no room to suppose that there was any abandonment of the premises*," (p. 94.)

With this report a bill was reported to the House in favor of the claimants, which in June, 1860, became a law.

The bill gave to the Society $20,000, "upon filing in the proper department a release to the United States, to be approved by the Attorney-General, of all land claimed within the limits of the Military Reservation at the Dalles in Oregon Territory, and of all claim for damages for destruction of property on or near said lands by the troops or volunteers or Indians, at any time anterior to the date of said release."

Under this Act the release was duly executed, approved, and filed, (p. 97.)

The decision of the Committee on Military Affairs, after a full investigation of the facts, its confirmation by both Houses of Congress, its approval by the President, and the proceedings under it, constitute a full acknowledgment and ratification of the title of the Methodist Missionary Society to the lands in question. The Society established its title in those proceedings. If the three hundred and fifty-three acres were their property, so are the remaining acres of the six hundred and fort granted by the Act. If the United States, in several departments of its government, has thus ratified and approved the title of the Society, how can it reject the same title in another department?

It is submitted that the injustice and wrong which such a rejection of the title must accomplish would be no more excusable on the part of the United States than were the hostilities of the Cayuse war on the part of the Indians. The one deprived the missionaries of a temporary possession of the Dalles station; the other would unjustly deprive them of such possession forever, and that, too, after a contribution of immense advantage toward the organization of the Territory had been made by the Methodist Missionary Society, by means of its mission at the Dalles.

It should be remembered, also, that the claim of the Missionary Society of the Methodist Episcopal Church was contested before Congress and the Committee on Military Affairs, and by the same parties who are now contesting the claim. The Court below fell into an error when it said, (p. 43,) that it was upon the *ex parte* representations of the defendant that Congress was induced to pay $20,000 for half of its lands and the improvements thereon.

The contestants, Dalles City and others, were there in force, as they were before the Surveyor-General and the Interior Department, and the facts adduced were not *ex parte*. They knew full well the effect of a decision in favor of that Society, and were well aware that if Congress passed an Act to pay said Society for such part of the six hundred and forty acres as had been taken for the military reserve, it was an effectual adjudication upon the right of the Society to the whole six hundred and forty acres.

If any doubt was before entertained as to the right of that Society to the land, the legislative interpretation of the meaning of the Act of Congress of 1848 in favor of said Society, made by the Act of 1860, must forever dispel such doubt. Having, on full investigation, thus admitted the right now contended for, the Government in all other departments would be inconsistent to deny what it has thus deliberately determined. The Surveyor-General (p. 79) remarks: "As between the Government and the Society they might perhaps plead executive and legislative recognition, but I apprehend that Congress cannot legally legislate away individual rights." To which it is answered, no individuals acquired any rights against the appellant's claim; for notice of that claim was abundantly given before any others came on the ground, (p. 77.)

The Land Department finally decided the question of the right of the appellant & the Patent and that decision by the Secretary of the Interior, is final. Quinby v. Conlan, 3 Morrison's Transcript p. 487.

FIFTH: It is clear, therefore, that as between the United States and the appellant the Patent for the lands in question (pp. 45–48) was well granted to the appellant; and none of the complainants in these actions can have any legal or just claim to any of the patented lands, for none of them were in possession thereof, or had acquired any prior claim thereto. No one came to the place until after the survey for the appellant, nor until after notice of the claim of the appellant, with the survey, was recorded in the county where the land is situate.

In June, 1850, Rev W. Roberts and others, on behalf of the appellant, made the survey of the lands, (p. 113.)

The survey was then recorded in the office of the Clerk of the Probate and County Court of Clackamas County, Oregon Territory, which county included the mission station at the Dalles. The record bears date Nov. 16, 1850, (p. 115.) Notice of the appellant's claim accompanied the survey, and was duly recorded in the record of land claims of the county, (pp. 102, 103.) Subsequently, on the organization of Wasco County, notification of the claim was recorded there, (p. 77.) And on the 29th March, 1854, a similar and formal notification of appellant's claim was filed with the Surveyor-General of Oregon, (p. 99.)

It was not until Nov. 1, 1853, that Winsor D. Bigelow claims to have become a settler under the Donation Act, (p. 35.)

Nor until 1855 that the boundaries of Dalles City were surveyed, and the plat thereof recorded; nor until 1860 that the survey as a town site was approved, (p. 13.)

So it is clear that none of these "after-comers" had any manner of claim when the appellant's survey and claim

were recorded; and none of them have acquired any rights as *bona-fide* settlers or claimants. Due notice of the appellant's title and prior occupancy stood in the way of all subsequent claims of whatever nature.

But none of these after-comers were entitled to any record notice of the claim of the Methodist Missionary Society to the Dalles mission station. It was well known to all that the station belonged to that society. The possession of those "after-comers" was furtive. The lands were not unappropriated nor vacant. There was a long-used landing on the river; a camping-ground between it and the bluff; a cultivated farm contiguous, and buildings erected for various uses thereon. These were patent evidences of prior and present occupation.

It was in February, 1849, (p. 115,) that the station and appurtenances were formally retransferred to the Methodist Society; and on the 13th March, 1849, formally redelivered, (p. 102.)

In the spring of 1850 Rev. Mr. Roberts, its agent, took actual repossession, making the survey in June of that year, according to the "previous understanding," of the boundaries of the station, (pp. 109, 113.) In the same June of 1850, Dr. Waller preached there at the Dalles mission station to the Indians, (p. 112.) That was a part of his work that year, as stated in the Minutes of the Society, (p. 123.)

There were then no other occupants there, (p. 115.) Here were two Methodist missionaries on the ground holding religious service among the Indians, and in full possession of the station. The "after-comers" found abundant evidence that the place had been in use and occupied by others; and no one has ventured to pretend he did not

know it was the mission station of the Methodist Missionary Society.

The nature of the claims of the "after-comers" shows they knew it was the mission station. One of them pretended it was bought from the Methodists; others that the Methodists had abandoned the property.

(1) One Perrin B. Whitman appeared before the Surveyor-General, and set up the absurd pretense that Dr. Whitman "purchased the Dalles station for a home for both of us;" he states (p. 64) that Dr. Whitman purchased the station for "a home for both of us." It does not, however, appear that he ever ventured to make a claim under this alleged purchase. He says, "perhaps he will try," (p. 65.)

By referring to his deposition it will be seen that he knows nothing personally, *of his own knowledge*, respecting such a purchase. It is only on *hearsay*, and on the natural bias of his personal interest, that his testimony and claim could rest. In the commencement of his testimony are the following question and answer:

"*Ques.* Do you know any thing about Dr. Whitman having purchased a missionary station at or near the Dalles of the Columbia from the Methodist Missionary Society?

"*Ans.* Witness *understood from him* that he purchased the Dalles station from the Methodist Society in the month of August, 1847," (p. 63.)

This was a leading question, directly suggesting to an interested witness the desired answer of a *purchase*, and ought not to have been asked in its objectionable form; and, in the next place, the answer given is entirely insufficient, even were it not contradicted by other evidence, on which to predicate the alleged purchase. What the wit-

ness "*understood*" from another person is not evidence against the Methodist Missionary Society. He states that he went to the Dalles station in the spring of 1849, but left in June, 1849, *because of his fear of the Indians.* Here he incidentally shows a good reason why the missionaries were not there; and if he had added, the station was then in possession of the United States military, he would have told the whole truth as to the occupancy at that time. He further says, that *he don't know that he has any interest in the Dalles station.* Of course he did not, and no one can suppose he has any such interest. The point would not be worth pursuing had not the Surveyor-General taken up a considerable space in his report on this pretended title of Dr. Whitman; and were it not adduced as evidence of abandonment by the Methodists.

The claim is without any foundation; is unsupported by any competent evidence, and stands opposed to the whole current of testimony from the beginning to the end of the case. Dr. Whitman never had any connection with the Dalles station for any individual purposes, but all his connection with it was solely as an agent of the American Board; and of this the testimony is conclusive. Without rehearsing this testimony in detail, it must be sufficient to refer to the positive evidence of the Rev. W. Roberts, as to the arrangement with Dr. Whitman, as an *agent of the American Board;* to the concurrent understanding of his co-laborers; and to the subsequent action of all parties. There is also a letter annexed to Major Rains's report, before referred to, which was written by the secretary of the American Board to the secretary of the Methodist Missionary Society, which is conclusive upon this question. It shows, according to *Dr. Whitman's own letters* to the sec-

retary of the American Board, that the transfer of the station was made to the Oregon Mission of that Board, "and not to any individual in his own right." "Dr. Whitman acted not for himself, but for the American Board." "This I say," says Dr. Treat, "in view *of his own letters now before me.*" (These letters are referred to in the Stipulation on p. 31.)

The Surveyor-General admits in his report that "Dr. Whitman gave it to be understood, at the time of the transfer to him, that he would carry on missionary labors at the Dalles." Hinman swears that Dr. Whitman so stated to him. But the doctor was not himself a preacher. How could he carry on missionary labors there without the assistance of his co-laborers? And what particle of evidence does the case disclose that there was any intention of carrying on so important and extensive a work, except with the aid of the Board at home, in its behalf, and under its auspices? There is no such evidence; and this point must be dismissed with the remark, that when the Surveyor-General found it necessary to rest an argument upon the baseless fabric of Dr. Whitman's supposed individual ownership of the Dalles property, he ventured into the domain of fancy, and ignored the most undeniable facts that are well established in the case.

(2) As to the claims of Dalles City, and the other contestants, mentioned in the beginning of the report of the Surveyor-General, it is sufficient to say, that those contestants had timely notice of the claim of the Methodist Missionary Society; for it is not questioned that in 1848 there was no occupancy of the Dalles property by any claimants, except the occupancy of the Methodist Missionary Society; and that Society gave full and timely notice of

their claim to the Dalles premises before any settlers came there.

The first attempt to occupy any land in the vicinity was in the fall of 1850, when the military prevented it, (p. 61.) There was no communication with the place up to that date, except by Indian canoes on the river Columbia, or by toilsome journey over the Cascade Mountains from the Willamette Valley; and no white person ever successfully attempted to settle there, except the missionaries, until the fall of 1851, or spring of 1852, (p. 62.) It is proved by a witness for the contestants [W. C. Laughlin] that the town site was unoccupied at that time. Prior to this time, to wit, in June, 1850, the Rev. W. Roberts had returned to the Dalles station and resumed the possession of it, and caused it to be surveyed. He states that no one else was then there in possession of any of this land at the Dalles, except the military, (p. 115.) As this survey was duly recorded in the clerk's office of Clackamas County, on the 16th of November, 1850, it is too plain for argument that neither Dalles City nor any other claimant can establish any title to the lands in question if the Methodist Missionary Society has a title as between it and the Government, under the Act of 1848.

A witness produced on the part of contestants—R. R. Thompson—testifies that he was acquainted with the Dalles premises. He says also, (p. 59:) "My first visit to the above-named point was in the latter part of the month of November, 1848. At that time I observed the buildings of what was understood to be the Methodist Mission, and the improvements in a good state of preservation. They were unoccupied at the time of our arrival. I was one of a party of thirty or forty persons who took possession of

those premises, and occupied them for a short space of time while on our way to Powder River in search of gold." This witness was hostile in interest and feeling to the Methodist Missionary Society, as plainly appears in his deposition; yet the above extract from his evidence shows two important facts: 1. The Dalles was occupied as a mission station in November, 1848, for the mission buildings and improvements were then there, and these were "the buildings of what was understood to be the Methodist Mission." 2. There was no other occupancy there at that date, and no pretense that these buildings and improvements belonged to any owner other than the Methodist Missionary Society.

SIXTH: AS TO THE BOUNDARIES OF THE LAND THAT HAVE BEEN PATENTED TO THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, THEY ARE PROPERLY DESCRIBED IN THE PATENT.

The argument made before the Surveyor-General by Messrs. Williams and Gibbs, on behalf of the Methodist Missionary Society, is, upon this point, so able and conclusive, that nothing further need be said than to quote that portion of their argument. It is as follows:

"Assuming that the Missionary Society is entitled to six hundred and forty acres at the Dalles, under the Act of 1848, the question arises as to the location and boundary

of said six hundred and forty acres. We say that the mission is entitled to the land as described in the claim presented to the Surveyor-General. This is substantially the claim as it was taken and held by the missionaries. We cannot say upon the evidence that the lines of the mission claim were actually run out prior to the survey of Mr. Roberts in the spring of 1850; but the general outlines of said claim were well understood long before that time. Mr. Waller swears that the survey of Mr. Roberts was made in accordance with this understanding. Mr. Roberts swears he made the survey to correspond with the original design in taking the claim, as indicated to him by Mr. Waller, who had resided there since 1840. Mr. Brewer, one of those who started the mission in 1836, seems to have understood this matter in the same way. It is impossible, without discrediting all the evidence upon the subject, to conclude that the mission claim, as originally taken, did not include the mill site, or mill, (or, as it is sometimes called, Mission Creek,) and that it did not also include the landing on the Columbia, at the mouth of said creek. This landing-place was as much used and occupied as any part of the claim; and the grounds between the mission buildings and the landing-place on the Columbia was occupied by wigwams of Indians connected with the mission.

"If the missionaries took a claim with any view to its utility or value, it is very reasonable to suppose that the claim was taken to embrace these valuable and necessary points. From the time this mission was established to the Cayuse war it was situated in a vast and unbroken wilderness; there was no necessity for exactly defining the lines of the mission claim, for there was nobody settled within hundreds of miles. No doubt the missionaries intended, if

persons ever came into the vicinity to settle, to mark out and give notice of their lines, and this is all that it was necessary or reasonable for them to do in order to protect their rights. We understand the law to be settled by the Supreme Court of the United States, that when the general Government grants a piece of land, the boundaries of which are not defined in the grant, the limits of such tract are fixed by a subsequent survey, and the grantee holds according to survey, provided the *rights of third persons have not attached to said tract between the grant and time of surveying it.* We refer for authority upon this point to ***Rutherford vs. Green's heirs***, 2 *Wheaton*, 196, *and Fremont vs. the United States*, 17*th Howard*, 542. The Court in the latter case, referring to the former, says that 'it recognizes, as a general principle of justice and municipal law, that such a grant for a certain quantity of land by the Government, to be afterward surveyed and laid off within a certain territory, vests in the grantee a present and immediate interest. In the language of the Court, *the general gift becomes a particular gift when the survey is made.*'

"We believe it has been the universal practice of settlers under the donation law to adopt and change the boundaries of their claims at will, so long as there were no adjoining claimants to be interfered with thereby. Each settler entitled to six hundred and forty acres was bound to take the land resided upon and cultivated by him; but he could make the lines of his six hundred and forty acres where he pleased, and change them as he pleased, provided he did not interfere with the rights of others, and provided, also, that the lines of his claim actually embraced the land resided upon and cultivated by him. We say that the Mission at the Dalles were not bound to fix their exact

and permanent lines prior to the survey of Mr. Roberts, in 1850, and that they can hold in accordance with that survey, because at that time there were no other claimants to the land included therein, and it was a matter wholly between the Government and the Mission. The survey of Mr. Roberts was recorded in the county where the land was then situated soon after it was made, and pains have been taken since that time to give the public notice of what the mission so claimed. Can persons who have come upon this claim since the survey of 1850, with actual or constructive notice of its extent, be heard to complain because such survey was not made at an earlier date? What difference does it make to them? Again, it is manifest that the grant contemplated a survey after the passage of the Act. Prior to that time the missionaries did not know whether Congress would give them one hundred and sixty, three hundred and twenty, or six hundred and forty acres. There is no reason why they should mark six hundred and forty or any other number of acres. As all the lands around them were vacant, they took and used what they needed. Suppose a mission station, prior to the passage of the Act, had taken a mission claim of three hundred and twenty acres, and actually marked its boundaries, would not that Society have the same right to six hundred and forty acres that any other station would have if, by the enlargement, there was no interference with third persons? Congress certainly did not intend to give a mission just the land its houses or fences covered; but we understand the law to give to every mission six hundred and forty acres if that quantity of vacant land be around their improvements. Suppose a settler under the donation law had taken one hundred and sixty acres prior to the passage of

that law, would he not have a right, subsequent thereto, to take and hold six hundred and forty acres? We say that it makes no difference how much land a mission station cultivated, had inclosed, or surveyed in 1840 or 1847; the station had a right, upon the enactment of the Act of 1848, to claim and hold six hundred and forty acres, provided such claim included their actual possession and improvements; and provided, also, that it did not interfere in any way with third persons." (See p. 114 as to what was included in the survey.)

SEVENTH: NO CASE WAS MADE IN THESE ACTIONS BY COMPLAINANTS DIFFERENT FROM THAT CONSIDERED AND DECIDED BY THE SECRETARY OF THE INTERIOR; NOR WAS ANY CASE MADE ENTITLING THEM TO A DECREE IN THEIR FAVOR.

The evidence in these causes adduced by the complainants, was substantially the same as had already been offered before the Surveyor-General. It consisted of the testimony of seven witnesses.

1. William Helm, an aged minister, seventy-seven years old, (p. 54,) was their first witness. He was never "at any time after the spring of 1846, a resident of Oregon east of the Cascade Mountains until some time after the year 1860," (p. 55.) He "was in the spring of 1846 in the Willamette Valley, and continued in that place up to 1850."

He knew nothing of his own knowledge except that the Methodist missionaries left the Dalles in 1847, under the order of Rev. Wm. Roberts.

His testimony does not in the least affect that given by Rev. Wm. Roberts himself, who was the only witness that knew the facts as to the Dalles mission and the arrangement with Dr. Whitman.

2. Nathan Olney, the next witness, married a squaw, (p. 57,) and was examined before the Surveyor-General. He says the premises, (p. 57,) were in the occupancy of "a detachment of volunteers on the 14th of Aug., 1848;" he states that he located a claim near THE DALLES, in March, 1848, and resided thereon without any apprehensions or difficulty with the Indians. But "when he located at the Dalles he had an Indian woman of the Deschutes tribe, and has had one most of the time since, with whom he lived as his wife." He was a trader with the Indians, and says that "the Catholic bishop located a mission station or claim adjoining witness on the east in June, 1848, and have continued since to occupy it until this time as such station," (p. 57.) That testimony is not true as to the Catholic occupancy of its station, as other testimony abundantly proved. Nor can it be true as to the asserted quiet of the country in 1848, as the warning of the Superintendent of Indian affairs, (on p. 101,) and other testimony proves.

3. R. R. Thompson, another witness for complainants, states, (p. 59,) that his first visit to the Dalles was in the latter part of November, 1848. "At that time," says he, (p. 59,) "I observed the buildings of what was understood to be the Methodist Mission and the improvements in a good state of preservation." He was one of a party of 30

or 40 persons who took possession of those premises and occupied them for a short space of time while on the way to Powder River in search of gold. "We found some animals there claimed by one of the party, Dr. Safferras, and he claimed to have resided at the mission for a short time."

No doubt a well armed party of 30 or 40 persons might have been unmolested by Indians at that particular time, especially as the military had so lately guarded the spot. But on p. 60 this witness shows his personal interest in the event of the suit, and his expressed hostility to the claim of the Methodist Missionary Society.

4. Wm. C. Laughlin, next witness for complainants, (p. 61,) came to the Dalles on the 3d October, 1850.

He could, therefore, know nothing of what transpired there anterior to that date. He desired to settle on the ground, "but was positively refused by the military, they claiming it as a military reservation. Major Tucker was in command of the military post at that time. . . . In 1852 they had ten miles up and down the river, the Dalles being the center of the reservation claimed by them; that is the military post," (p. 61.)

He then undertakes to relate, (p. 62,) a conversation with Rev. W. Roberts, and imputes to him the statement "that he had proposed to sell and move the station to the valley to save expense." But on cross-examination he is asked "whether or not, in the conversation referred to with Mr. Roberts, he said that he sold the land claimed by the Mission?"

"*Ans.* I think he did not so state."

5. The next witness was Perrin B. Whitman, (p. 63,) and his absurd pretense that Dr. Whitman bought the sta-

tion "as a home for both of us," has already been referred to, (*ante* p 42,) and abundantly disproved.

6. Elisha McDaniel was the next witness. He locates an Indian village between the rocky bluff and the Columbia River, (p. 68;) also where the landing was; and that "the volunteers had possession," in the spring of 1848, "of the improvements on the bluff belonging to the Missionary Society."

His testimony is not adverse to the appellants, and calls for no remark.

7. Edward Crate, over sixty, a French Canadian, who could not write his name, was the last witness for complainants. His wife was an Indian quadroon, and he belonged to the Catholic Church, (p. 71.) He was engaged in boating up and down the Columbia river, and thinks the Indians were friendly enough so far as he knew, (p. 70.)

His testimony is quite insufficient to overthrow the positive proof of the hostility of the Indians, especially to Protestant missionaries.

EIGHTH: Review of the foregoing Points.

A brief review and a few general remarks will conclude this argument. The evidence in the case clearly establishes the following points:

1. The Methodist Missionary Society founded a mission at the Dalles in 1836, and continued missionary opera-

tions at its mission station there from that time to September, 1847, without interruption.

2. It erected buildings and made other improvements at the station at considerable cost and sacrifice, and also inclosed and cultivated a farm there of from seventy-five to one hundred acres.

3. It was among the first to lead the way for the white population to that vicinity, and to the valleys of the Columbia and the Willamette; and the first to introduce horned cattle, horses, and the arts of agriculture into the Territory of Oregon.

4. By means of its mission stations, including the one at the Dalles, and of the settlement of its agents and missionaries upon them, it attracted thither the tides of population, and contributed to prepare the way for the organization of the territorial government, and to extend the area of the United States in that distant region.

5. Its mission property at the Dalles constituted, both in September, 1847, and on the 14th of August, 1848, the only evidences of settlement or of civilized occupation in that neighborhood, and was well known at those dates, as it had been before, as the mission station belonging to the Methodist Missionary Society.

6. It provided in September, 1847, for a continuation of the missionary work among the Indians at the Dalles, and for a continued occupation of its mission station there, for that purpose, by annexing to the permitted occupancy of the station by the American Board *an express condition* that such missionary work should be continued there as usual.

7. In November following Dr. Whitman and others

were murdered, and his employees fled from the station, and the Cayuse war began.

8. Although the conditional occupancy of missionaries of the American Board had thus terminated, and the right of occupancy had reverted to the Methodist Missionary Society in the fall of 1847, yet it was prevented from re-occupying the station, in the strict sense of having its missionaries there actually treading the soil, by means of the Indian hostilities superinduced by the Cayuse war; by fears of assaults and murders from the Indians; by the warning of Major Lee, Indian Superintendent; by the occupancy of the United States military, and by the prudence of reasonable men, until the spring of 1850.

9. Its missionaries then returned to the spot for the purpose of resuming missionary operations there; but were forbidden and prevented from pursuing their work by the military commandant then at the post, who was probably actuated by a spirit of hostility to Protestant missionaries and to the Methodists in particular.

10. In June of the same year, 1850, the Methodist Missionary Society, by its duly authorized agents, caused a survey to be made and recorded of the six hundred and forty acres claimed by it at the Dalles, the boundaries being so run as to include its buildings and improvements, its inclosed and cultivated farm of from seventy-five to one hundred acres, the plateau on the prairie where its cattle had been accustomed to graze, its landing-place on the Columbia River, and its mill site on Mission Creek.

11. There were no settlers on, nor adverse claimants to, this tract of land, or any part thereof, at that time.

12. During the *interregnum* between the fall of 1847 and the 14th of August, 1848, the Dalles mission station

was occupied by the buildings and improvements placed there by the Methodist Missionary Society, and with its improvements was known and spoken of as the mission station belonging to the Methodist Missionary Society, and as occupied by it as a mission station among the Indians.

13. It never abandoned this station, nor intended to do so at all, but transferred its occupancy without compensation to the American Board aforesaid, on the *express condition that missionary operations should be continued there as usual.*

14. Both Missionary Societies well understood the effect of the breach of that condition to be, to re-invest the Methodist Missionary Society with all its former rights of ownership and occupancy, and have given full effect to that understanding by the most unequivocal acts, to wit, by the surrender of a draft taken, at the time, for the price of some movable property; by the formal retransfer of the station, both by the American Board and its agents; and by the declaration and quit-claim of the American Board.

15. At the breaking out of the Cayuse war the military took possession of the mission buildings at the Dalles station, and by authority of the United States Government a military post was established there, and a reserve of three hundred and fifty-three acres of land laid out, surveyed, and occupied for military purposes *within* the boundaries of the six hundred and forty acres claimed and surveyed by the Methodist Missionary Society.

16. For the land and improvements thus taken by the Government, said Methodist Missionary Society applied to Congress for compensation, founding their application upon the title of the Society to said six hundred and forty

acres, confirmed by the Act of August 14, 1848, and which application, though opposed, was examined and approved by the Secretary of War, by the Committee on Military Affairs in the House of Representatives, by both Houses of Congress, and by the President of the United States, and, accordingly, an Act was passed in June, 1860, granting such compensation to the extent of $20,000.

17. No different state of facts is now disclosed from what appeared before Congress when the last-named Act was passed, and the *claim now made to the remainder of the said six hundred and forty acres is placed on the same ground as was the claim before Congress* for compensation for the portion taken for military purposes.

18. Although it is charged, it is not in fact true, that the said Methodist Missionary Society has ever received any other land in Oregon Territory under the Act of August 14, 1848; and it never has applied for any land under that Act, except for the said six hundred and forty acres at the Dalles.

19. There were no rival claimants to any portion of this tract under said Act; but there are certain contestants, including Dalles City, who oppose the claim of the said Missionary Society, although none of them ever went to the spot, or had or made any claim, as settlers or otherwise, to any part of it, until *after* the survey of the Methodist Missionary Society was made, and due notice of it given, by recording it in the Clerk's Office of the county where the land is situated.

20. Such notice of the Methodist Missionary Society has been repeated in every possible and public manner, especially by filing it with the Surveyor-General of Oregon,

and the claim of the Methodist Missionary Society was well known to all.

21. A Catholic mission, begun at a spot about a mile distant from the Methodist mission station at the Dalles only a few weeks prior to the 14th of August, 1848, and whose missionaries were then absent therefrom, has applied for and received a patent for six hundred and forty acres of land, including its station, it not being pretended that more than a small portion of the six hundred and forty acres thus obtained by the Catholic Society was ever occupied by it.

22. The case in all particulars, as to the claim of the Methodist Missionary Society, was fully considered by the Secretary of the Interior, (pp. 89-97,) and was properly decided by him, after appeal from the Commissioner of the Land Office; and, pursuant to that decision, a Patent was duly issued to the Missionary Society of the Methodist Episcopal Church for the premises in question.

The mere statement of these points, all of which are made out and supported by the evidence, would seem to be a sufficient argument of the case, for they lead with irresistible precision to but one corollary, and that is, *the title to the six hundred and forty acres of land claimed and surveyed by the Methodist Missionary Society*, according to the plain meaning of the Act of Congress of 1848, and according to the interpretation of that Act, as given by Congress itself, as also by the Land Department in their grant to the Catholics, and subsequently by the issuing of the Patent, (pp. 45–48,) under the decision of

the Secretary of the Interior, *was confirmed and established in the Missionary Society of the Methodist Episcopal Church.*

As to the intention of Congress in framing the provision of the Act under which the claim of the appellant is made, there can be no doubt. If a just title to the land in question can be shown, by long occupation, cultivation, and improvement, the Methodist Missionary Society have done it; and if the plain objects and purposes of the Act of Congress are regarded, the title to such land must be confirmed to that Society; for no one can fail to see that to the Methodist Missionary Society now belongs the Dalles station, as much as it did in 1847; and the technical objections to its title thereto founded on the claims of after-comers, with notice, are unworthy the consideration of reasonable men and should not prevail.

NINTH: THE DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON SHOULD BE REVERSED WITH COSTS; AND THE CAUSE REMANDED TO THAT COURT WITH DIRECTIONS TO DISMISS THE COMPLAINANT'S BILL WITH COSTS.

E. L. FANCHER,
Of Counsel for Appellant,
229 Broadway, New York.

SUPREME COURT, U.S.
FILED
JAN 8 1903
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17-336 ★ 347

Supreme Court of the United States.

No. 207.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH,

Appellant,

vs.

JAMES K. KELLY, AARON E. WAIT AND PHEBE HUMASON.

BRIEF FOR APPELLANT.

E. L. FANCHER,
Of Counsel for Appellant,
229 BROADWAY, NEW YORK.

SUPREME COURT

OF THE UNITED STATES.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH,
Appellant,
vs.
JAMES K. KELLY, AARON E. WAIT, and PHEBE HUMASON.

No. 207.
Brief for Appellant.

APPEAL FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

I.

Statement of the Case.

The appellees filed their bill in the Circuit Court of the United States, for the District of Oregon (see same, pp. 13-18), against the appellant, alleging that one Winsor D. Bigelow was, on the first of Nov., 1853, a white male settler upon the lands of the United States, described in the bill (p. 14), and personally resided upon and cultivated the said described tract, from Nov. 1, 1853, to the 16th Feb., 1860; that he had complied with the provisions of the Act of Congress (called the Donation Act), approved Sept. 27, 1850, so as to entitle him to a donation of said tract (320 acres). That on account of a claim by the appellant (the

Missionary Society of the M. E. Church), the Register and Receiver of the Land Office refused to give a certificate of residence and cultivation until the controversy between the said claimants should be decided by the Land Department. (p. 14.)

That by deed of 19th Dec., 1862, the said Winsor D. Bigelow conveyed to Kelly and Wait (two of the appellees) the undivided one-third of the tract; and by deed of 12th Dec., 1864, he conveyed to Orlando Humason the other undivided two-thirds. The latter died testate, and devised his interest to the appellee Phebe Humason. And the complainants in the bill alleged they thus became owners as tenants in common of the tract (p. 15).

They further allege that 27 acres of the tract are within the boundaries of 643, 37 acres claimed by the appellant, under a patent from the United States issued July 9, 1875 (p. 15). [The other allegations in the Bill of Complaint are similar to those contained in the bill in No. 206.]

The answer of the appellant denies the material allegations of the complaint (pp. 21–29), and sets up title in the appellant under the Act of Aug. 14, 1848, and the Patent of the United States granted on the 9th July, 1875, after a contest, and after the decision as to the conflicting claims by the Secretary of the Interior (p. 28).

The cause was tried in conjunction with No. 208 and No. 206, before Deady, J., and in all three causes the testimony in one cause was agreed to be received in the other causes. (See Record in No. 206, p. p. 30 and 31, Dalles City cause, for the stipulations.)

The Judge at the Circuit decided in favor of the complainants (see Decree, p. 34), and he delivered one opinion in the three causes (pp. 35–47).

From his decree the defendant, The Missionary Society of the Methodist Episcopal Church, appealed to the Supreme Court of the United States (p. 49).

II.

Assignment of Errors.

The decree is erroneous in these particulars:
In deciding—

1. That the land described in the bill of complaint was voluntarily abandoned by the appellant as a mission station in September, 1847.

2. That it was not thereafter occupied by the appellant as a mission station, or otherwise.

3. That the same was not confirmed to the defendant (appellant) by the second proviso of section one of the Act of Congress, entitled "An Act to establish the Territorial Government of Oregon," approved August 14, 1848.

4. That the Patent issued to the defendant by the United States on July 9, 1875, for and including the said lands, was wrongfully issued.

5. That the complainants are the owners in fee of the said described lands, by virtue of a grant under the Act of Congress, entitled "An Act to create the office of Surveyor-General of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September 20, 1850, to Winsor D. Bigelow, and by sundry mesne conveyances from him to the conplainants, and are entitled to the patent therefor.

6. That the defendant received its patent for said lands as trustee for the complainants, and that defendant within ninety days convey the same to the complainants and pay costs of the action.

7. Said decree is further erroneous in not adjudging that the patent for said lands issued by the United States on July 9, 1873, was legal and valid.

8. Said decree is also erroneous in not adjudging that the decision of the Land Department as to the right of the defendant to said lands, which was made by the Secretary of the Interior, is final.

9. Also in not adjudging that the title to said lands was confirmed and established in the appellant by the first section of the aforesaid Act of Congress, approved August 14, 1848, as a missionary station, then occupied and belonging to the appellant as a religious society.

And,

10. In not adjudging that the bill of complaint herein be dismissed, with costs to be paid by the complainants.

III.

Argument for Appellant.

1. By the stipulations made in this cause, and in two other causes (see Dalles case, No. 206, pp. 30, 31), all the testimony in the Dalles case is made applicable to the present case.

The opinion of Deady, *J.*, was one and the same in all the three cases.

Appellant, therefore, refers to the brief and argument in the Dalles case, No. 206, and desires that it be applied to the present case.

2. Also, to add that the decision of the Land Department, by its superior officer, the Secretary of the Interior, was a full and final decision of all the controverted questions in these causes. There was no mistake of law, nor any fraud nor any misrepresentation made to the officers of that depart-

ment, and no such ground for the interference of the Court is alleged.

Quinby *v.* Conlan, 3 Morrison's Transcript, p. 487, and cases cited, p. 494.

3. The decree of the Circuit Court of the United States for the District of Oregon should be reversed with costs, and the cause remanded to that Court with directions to dismiss the complainant's bill, with costs.

E. L. FANCHER,
Of Counsel for Appellant,
229 Broadway, New York.

OFFICE SUPREME COURT U. S.
FILED
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17-336

Supreme Court of the United States.

No. 208.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH,

Appellant,

vs.

JAMES K. KELLY AND AARON E. WAIT.

BRIEF FOR APPELLANT.

E. L. FANCHER,
Of Counsel for Appellant,
229 BROADWAY, NEW YORK.

SUPREME COURT

OF THE UNITED STATES.

THE MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH,
Appellant,
vs.
JAMES K. KELLY and AARON E. WAIT.

No. 208.
Brief for Appellant.

APPEAL FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

I.

Statement of the Case.

The appellees filed their bill in the Circuit Court of the United States, for the District of Oregon (see same, pp. 13-17), against the appellant, alleging that one Winsor D. Bigelow was, on the first of Nov., 1853, a white male settler upon the lands of the United States, described in the bill (p. 14), and personally resided upon and cultivated the said described tract, from Nov. 1, 1853, to the 16th Feb., 1860; that he had complied with the provisions of the Act of Congress (called the Donation Act), approved Sept. 27, 1850, so as to entitle him to a donation of said tract (320 acres). That on account of a claim by the appellant (the

Missionary Society of the Methodist Episcopal Church), the Register and Receiver of the proper Land Office declined to give a certificate of residence and cultivation until the controversy between the said claimants should be decided by the Land Department (p. 14).

That by deed of 2d Dec., 1864, the said Winsor D. Bigelow conveyed to Kelly and Wait (the appellees), certain lots in the "Bluff addition to Dalles City." And the complainants in the bill alleged they thus became owners of the lots (p. 14).

They further allege that the lots are within the boundaries of 643 37–100 acres claimed by the appellant, under a patent from the United States issued July 9, 1875 (p. 15). [The other allegations in the Bill of Complaint are similar to those contained in the bill in No. 206.]

The answer of the appellant denies the material allegations of the complaint (pp. 20–29), and sets up title in the appellant under the Act of Aug. 14, 1848, and the Patent of the United States granted on the 9th July, 1875, after a contest, and after the decision as to the conflicting claims by the Secretary of the Interior (p. 27).

The cause was tried in conjunction with No. 208 and No. 206, before Deady, J., and in all three causes the testimony in one cause was agreed to be received in the other causes. (See Record in No. 206, p. p. 30 and 31, Dalles City cause, for the stipulations.)

The Judge at the Circuit decided in favor of the complainants (see Decree, p. 33), and he delivered one opinion in the three causes (pp. 35–46).

From his decree the defendant, The Missionary Society of the Methodist Episcopal Church, appealed to the Supreme Court of the United States (p. 50).

II.

Assignment of Errors.

The decree is erroneous in these particulars:
In deciding—

1. That the land described in the bill of complaint was voluntarily abandoned by the appellant as a mission station in September, 1847.

2. That it was not thereafter occupied by the appellant as a mission station, or otherwise.

3. That the same was not confirmed to the defendant (appellant) by the second proviso of section one of the Act of Congress, entitled "An Act to establish the Territorial Government of Oregon," approved August 14, 1848.

4. That the Patent issued to the defendant by the United States on July 9, 1875, for and including the said lands, was wrongfully issued.

5. That the complainants are the owners in fee of the said described lands, by virtue of a grant under the Act of Congress, entitled "An Act to create the office of Surveyor-General of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September 20, 1850, to Winsor D. Bigelow, and by sundry mesne conveyances from him to the conplainants, and are entitled to the patent therefor.

6. That the defendant received its patent for said lands as trustee for the complainants, and that defendant within ninety days convey the same to the complainants and pay costs of the action.

7. Said decree is further erroneous in not adjudging that the patent for said lands issued by the United States on July 9, 1875, was legal and valid.

8. Said decree is also erroneous in not adjudging that the decision of the Land Department as to the right of the defendant to said lands, which was made by the Secretary of the Interior, is final.

9. Also in not adjudging that the title to said lands was confirmed and established in the appellant by the first section of the aforesaid Act of Congress, approved August 14, 1848, as a missionary station, then occupied and belonging to the appellant as a religious society.

And,

10. In not adjudging that the bill of complaint herein be dismissed, with costs to be paid by the complainants.

III.

Argument for Appellant.

1. By the stipulations made in this cause, and in two other causes (see Dalles case, No. 206, pp. 30, 31), all the testimony in the Dalles case is made applicable to the present case.

The opinion of Deady, *J.*, was one and the same in all the three cases.

Appellant, therefore, refers to the brief and argument in the Dalles case, No. 206, and desires that it be applied to the present case.

2. Also, to add that the decision of the Land Department, by its superior officer, the Secretary of the Interior, was a full and final decision of all the controverted questions in these causes. There was no mistake of law, nor any fraud nor any misrepresentation made to the officers of that depart-

ment, and no such ground for the interference of the Court is alleged.

Quinby *v.* Conlan, 3 Morrison's Transcript, p. 487, and cases cited, p. 494.

3. The decree of the Circuit Court of the United States for the District of Oregon should be reversed with costs, and the cause remanded to that Court with directions to dismiss the complainants' bill, with costs.

E. L. FANCHER,
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229 Broadway, New York.

OFFICE SUPREME COURT U.S.
FILED
JAN 13 1883

In the Supreme Court

—OF—

THE UNITED STATES.

OCTOBER TERM, 1882.

THE MISSIONARY SOCIETY OF THE METHODST EPISCOPAL CHURCH.
Appellant,

vs.

THE DALLES CITY.
Appellee.

No 206.

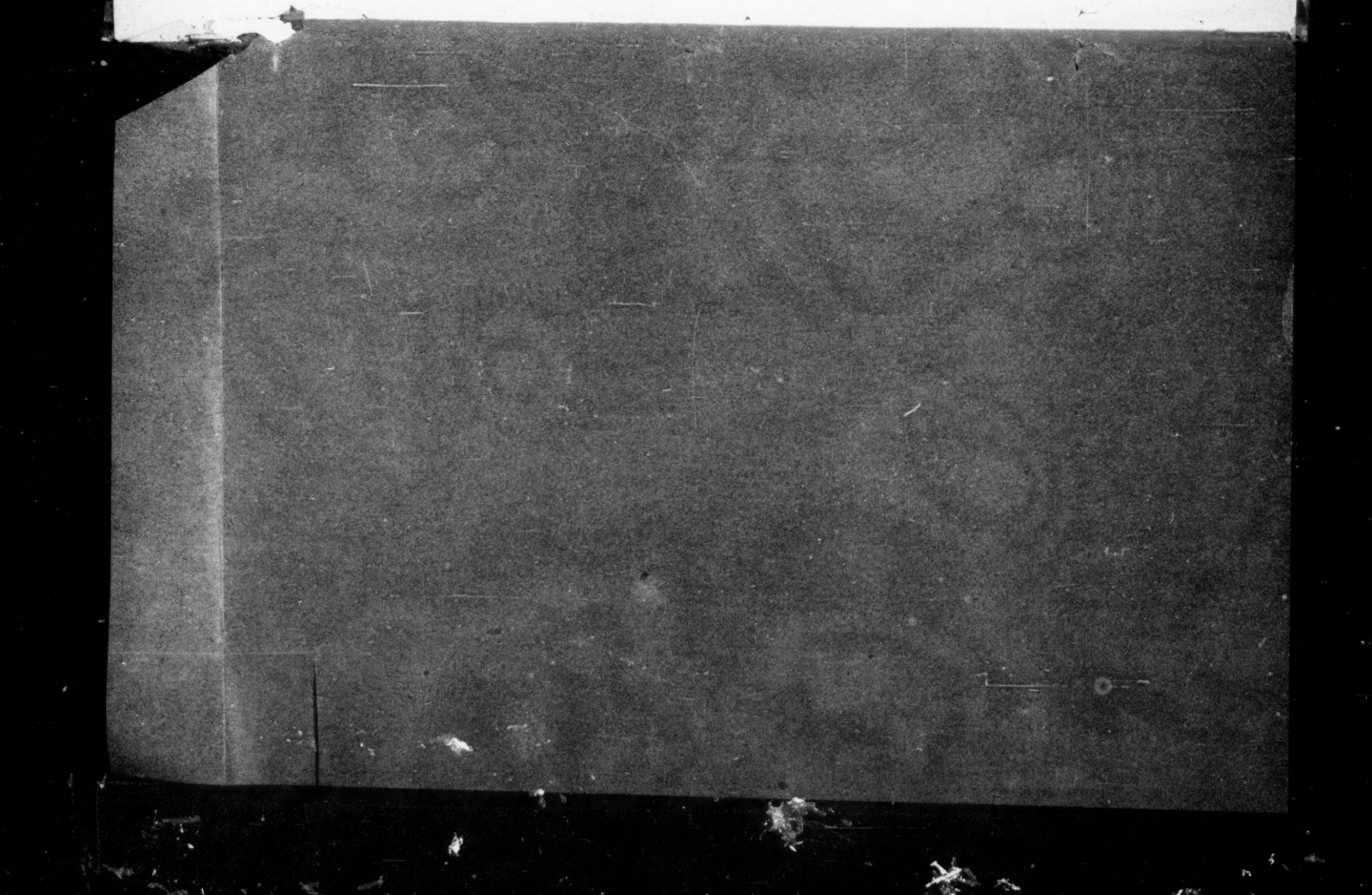
APPEAL FROM THE CIRCUIT COURT

OF THE UNITED STATES, FOR THE DISTRICT OF OREGON.

BRIEF AND ARGUMENT FOR APPELLEE.

JAMES K. KELLY, SOLICITOR FOR APPELLEE.

PORTLAND, OR.
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OCTOBER TERM, 1882.

THE MISSIONARY SOCIETY OF THE METHODST EPISCOPAL CHURCH.
Appellant,

vs.

THE DALLES CITY,
Appellee.

APPEAL FROM THE CIRCUIT COURT

OF THE UNITED STATES, FOR THE DISTRICT OF OREGON.

BRIEF AND ARGUMENT FOR APPELLEE.

JAMES K. KELLY, SOLICITOR FOR APPELLEE.

The appellant is a corporation, formed under the laws of the State of New York, and in 1834 sent its missionaries to the Oregon Territory, where they established three missionary stations in that portion of the Territory which lies west of the Cascade Mountains.

In 1838, under the superintendency of Rev. Jason Lee,

a station was established east of the Cascades, at Wascopum, on the banks of the Columbia River, and on the land now claimed by the appellant.

In 1844, the Rev. George Gary superceded Jason Lee, and changed the policy pursued by his predecessor, by selling and otherwise disposing of the property of the several stations west of the Cascades, and in the Spring of 1847 had entered upon negotiations with Dr. Marcus Whitman, with the view of selling the missionary station at Wascopum.

In July of that year, he was superceded by Rev. Wm. Roberts, who continued the negotiations with Dr. Whitman, and which finally were concluded in August, 1847, whereby it was agreed to transfer the possession of the missionary station at Wascopum, known as *The Dalles Mission*, to Dr. Whitman, upon the latter giving a draft on the American Board of Commissioners for Foreign Missions, for $600. This draft, it is claimed, was for the payment of a canoe and some farming utensils.

In July or August, 1847, Dr. Whitman had gone from his missionary station at Wailatpu, in Walla Walla Valley, to the Willamette Valley, a distance of three hundred miles, to conclude the negotiations, and early in September went up the Columbia River with Mr. Roberts, when the latter formally delivered to Dr. Whitman the possession of The Dalles Missionary Station.

The Methodist missionary, Rev. Alvin F. Waller, who had before that time been in the occupancy, was withdrawn, and went down the river with Mr. Roberts, and from that time all missionary labors on the part of the Methodist missionaries at The Dalles Mission entirely ceased.

After taking actual possession of The Dalles Missionary Station, Dr. Whitman remained there only two or three

days, and then went to his home, at Wailatpu, leaving his nephew, Perrin B. Whitman, a youth of seventeen years of age, in possession of the buildings formerly occupied by the Methodist missionaries.

In the month of October, Alanson Hinman was sent down from Walla Walla Valley by Dr. Whitman to attend to the farming operations at The Dalles Missionary Station. He arrived there about the middle of October, remained there a short time and then went to Vancouver for medicines, etc. It was probably the intention of Dr. Whitman to go down to this station in the Spring of 1848, or send some one of the missionaries under his jurisdiction to occupy it, but on the 29th day of November, 1847, he and his family, and a number of others, were murdered by the Cayuse Indians at his home, at Wailatpu.

Information of the murder of Dr. Whitman and family was sent by messenger through The Dalles to the Willamette Valley, although it was not communicated to Perrin Whitman, who remained in ignorance of the fate of his uncle until he was informed of it by Mr. Hinman, who had returned from Fort Vancouver, where he had first heard of the massacre. Troops were immediately sent from the Willamette Valley by the Provisional Government of Oregon to chastise the hostile Indians. These troops, while going up the Columbia, and within thirty miles of The Dalles, were met by Perrin B. Whitman and Mr. Hinman, who had left the missionary station and were on their way to the Willamette Valley. Young Whitman went on down the river, but Hinman returned with Capt. Lee's company of volunteers to The Dalles Missionary Station, and opened the buildings, for the accommodation of the Oregon volunteers.

In January, 1848, Perrin B. Whitman returned from Oregon City and went up with the volunteers to the Walla

Walla Valley, to act as interpreter for the officers in the Cayuse war. The hostile Indians were chastised and subdued, and tranquility restored to the country in Eastern Oregon. And in March, 1848, after the subjugation of the Indians, the volunteer forces passed through The Dalles, on their way to the Willamette Valley. A small detachment was left in possession of the missionary buildings, to take care of some property belonging to the volunteers, who remained there until June, 1848, when the missionary station was wholly abandoned, and no one left to occupy the buildings.

After the month of December, 1847, there was no occupancy of the missionary station by any person or persons representing the American Board of Missions (Presbyterian), or any other missionary society.

The foregoing statement of facts is admitted to be correct by both parties to this suit, and is established, beyond a doubt, by the testimony on both sides in this controversy.

On the 14th day of August, 1848, an act of Congress, "To establish the Territorial Government of Oregon," was approved.

9 Statutes at large, 323.

The second *proviso* of the first section of this act is as follows:

"That the title to the land not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory; together with the improvements thereon, be confined and established in the several religious societies to which said missionary stations respectively belong."

It is admitted, at least it cannot be successfully denied,

that the Methodist Missionary Society had abandoned The Dalles Station eleven months before the act of Congress was passed.

This question was asked Mr. Roberts, the superintendent of the Methodist missions :

"Did you claim that station, or were you in the actual occupancy of it as a Methodist missionary between those dates? (September, 1847, and March, 1849).

ANSWER.—"Whatever may be the legal meaning of actual occupancy, in common acceptation, I did not claim it, and did not occupy it."

See printed Record, p. 122.

Rev. William Helm, another of the Methodist missionaries, testified as follows :

QUES. 4.—State, if you know, at what time the Missionary Society of the Methodist Episcopal Church ceased to perform missionary labors at The Dalles, in Oregon?

ANSWER.—"About the 1st of September, in the year 1847."

QUES. 7.—State whether or not the Missionary Society of the M. E. Church have ever re-established a missionary society at The Dalles?

ANSWER.—They have not.

QUES. 8.—State, if you know, at whose instance, or by whose order, the missionary station at The Dalles was abandoned, as you stated, in 1847?

ANSWER.—"By the order of Rev. William Roberts, who was then the agent."

Printed Record, p. 54.

From the foregoing, as well as all the other testimony upon that subject, it is clearly established that the Meth-

odist Missionary Society sold and abandoned the station at The Dalles eleven months before the act of the 14th of August, 1848, was passed.

Knowing well that it could claim no title, by virtue of its own occupancy, the Methodist Missionary Society seeks to obtain the title through the American Board (Presbyterian), by virtue of an alleged occupancy of The Dalles station, by its missionaries, and a subsequent transfer to the Methodist Society; or rather that the American Board would have occupied the station on the 14th of August, 1848, if Dr. Whitman had not been killed on the preceding year; and if that society had not been prevented from the occupancy by the Indian hostilities.

Even if these allegations were true, it would be of no avail when the law required actual occupancy of the station on the 14th of August, 1848, but, in point of fact, they are not true.

It is a matter of history that the Cayuse Indians, who murdered Dr. Whitman, were the only Indians in Eastern Oregon who were hostile towards the white people from 1847 to 1855, and they were 140 miles from The Dalles station. These Indians were thoroughly subdued by the Oregon volunteers, in the Winter of 1847–8, and the troops returned through The Dalles as early as March, 1848, on their way to their homes, in the Willamette Valley.

Nathan Olney, one of the Oregon volunteers in the Cayuse war, and subsequently U. S. Indian agent in 1854 and 1855, testifies as follows:

"When I arrived here (The Dalles), in December, 1847, the mission buildings were unoccupied, and from that day to this, have not been occupied as a mission station. * * When witness arrived at The Dalles in December, 1847, he found the mission property all remaining that had been

left by Hinman, consisting of stock, household furniture, etc. In February, 1848, Mr. Hinman and other missionaries came up and took away their property, to-wit, stock and everything else movable. Some of the windows and doors were taken away at the time."

Printed Record, p. 56.

Again he says :

"The main body of troops had been discharged about the 1st of June, 1848, and only two small detachments, one at The Dalles and the other at Whitman's, remained in charge of the Government property at these places. *Quiet had been restored to the country.* * * * * * After the disbanding of the troops, in the Spring of 1848, the relations between the whites and Indians were friendly. Witness resided at The Dalles after the Spring of 1848, and had every day intercourse and trade with them, and they were more friendly after that war than before. Witness located a claim near The Dalles in March, 1848, and resided thereon without any apprehension of difficulty with Indians."

Printed Record, p. 57.

R. R. Thompson, also, at one time an Indian agent in Oregon, and now a prominent citizen of California, testifies as follows :

"My first visit to the above named point (The Dalles) was in the latter part of November, 1848. At that time I observed the buildings of what was understood to be the Methodist mission, and the improvements in a good state of preservation. They were unoccupied at the time of our arrival. * * * We found the Indians numerous and very friendly to barter and render us any assistance that we required, on any terms that we might make with them or agree upon. The same remark is true of all the Indians

we met with from there to Umatilla, in the Cayuse country, 130 miles above The Dalles, at which point we turned back. We traveled through the country, taking no more care or precaution than is usually had by persons traveling through an Indian country."

Printed Record, p. 59.

The simple fact that the buildings formerly belonging to the mission were not destroyed or injured by the Indians, although they were unoccupied, shows that they were guarded and protected by the Indians, who were friendly and well disposed towards the whites.

Indeed, the Indians around The Dalles were always friendly towards the whites, even at the time of the massacre of Dr. Whitman and his family. They besought Mr. Hinman and young Whitman to stay with them when they were about to leave for the Willamette Valley, in December, 1847. They offered to protect these gentlemen if they would only remain, but they left the poor Indians to take care of themselves.

After the Cayuse war was over, The Dalles Indians requested the missionaries to return, and offered them all protection, but they declined to go back, as true missionaries would have done.

Printed Record, p. 121–2.

It is true Mr. Roberts, Mr. Waller and Mr. Hinman say that it would not have been safe for missionaries to have returned to The Dalles after March, 1848, and until some two or three years afterwards. But it must be borne in mind that they only speak from hearsay. Messrs. Roberts and Waller had not been east of the Cascade Mountains from the time they sold and abandoned The Dalles station, in September, 1847, until they returned to survey the land, in 1850. And Mr. Hinman, after he went up in Febru-

ary, 1848, to remove the property, including the doors and windows of the mission buildings, immediately returned to the Willamette. Neither of these gentlemen were within 150 miles of The Dalles, and not within 300 miles of the Cayuse country. They were all very timid men, and some allowance must be made on account of their fears; but the fact is, nevertheless, that the fear of Indians was confined to the Methodist missionaries, and them alone.

Mr. Roberts testifies to one case of violence on the part of the Indians, near The Dalles, in September, 1847, when he went up to deliver possession to Dr. Whitman; yet it was not towards any person connected with the missionary station, but with some immigrants who had endeavored to overreach the Indians in a trade. And what country is there, civilized or savage, where individual cases of personal violence do not occur?

Akin to the excuse of fear from Indian violence for not occupying the station on the 14th of August, 1848, is another that H. A. G. Lee had issued an order to the Messeurs Blanchett (Catholic missionaries), dated July 13, 1848, forbidding them and all other missionaries to carry on missionary operations east of the Cascade Mountains. This was, in fact, mere *brutem fulmen* against the Catholic missionaries, and without any authority of law, as H. A. G. Lee was not an authorized Indian agent appointed by the President. Dr. Elijah White was the agent, duly appointed by the President, although at the time temporarily absent from Oregon. And no evidence has been offered to show that he appointed, or could appoint, Capt. Lee to act in his stead. Notwithstanding this order, the Messeurs Blanchett, in June, 1848, did establish a missionary station at The Dalles, and within one mile of the abandoned and deserted station of the Methodists. This Catholic mission has been continued from June, 1848, until this day.

But why does the Methodist Missionary Society claim that it was deterred by Indian violence or the order of Capt. Lee from re-occupying its deserted station when the fact is, that it could not resume possession without a violation of its agreement with Dr. Whitman?

The Methodist Missionary Society, satisfied that it had no title to the land in controversy, by virtue of its own occupany of the station on the 14th of August, 1848, has sought to procure a supposed title from the American Board of Commissioners for Foreign Missions, alleged to be acquired by virtue of occupancy by Dr. Marcus Whitman before his death, in November, 1847. To obtain this supposed title, a quit-claim deed was procured, on the 28th day of February, 1859, by the Methodist Society from the Presbyterian Society.

See Printed Record, p. 97.

To this, I have to say that Dr. Whitman never did occupy The Dalles station. He purchased it from the Methodist Society, with the intention of occupying it some time in the Spring of 1848. Placing his nephew in possession was by no means establishing a missionary station there. This lad, Perrin B. Whitman, was only 17 years old, and although it is sought to prove, by the testimony of Alanson Hinman, that young Whitman did missionary work during the two or three months he was there, yet Whitman himself swears that he did not; that he was not employed as a missionary, and beyond interpreting on two or three occasions for Mr. Hinman, he did nothing in the way of missionary labor.

Printed Record, pp. 64, 66.

But the Presbyterian Society, I maintain, were estopped in law from claiming The Dalles station. Dr. Whitman was, at the time of his death, and for eleven years before,

in the occupancy of a missionary station at Wailatpu, then in Oregon, but now in Washington Territory.

By the "act to establish the Territorial Government of Washington," approved March 2, 1853, it is declared in the second *proviso* to the first section, "that the title to the land not exceeding 640 acres, now occupied as missionary stations among the Indian tribes in said Territory, *or that may have been so occupied as missionary stations prior to the passage of the act to establish the Territorial Government of Oregon*, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations belong."

Under this act of Congress, the Presbyterian Society claimed the title to the missionary station at Wailatpu, by virtue of the occupancy of Dr. Whitman.

Printed Record pp. 86, 87 and 88.

Having elected to claim the Wailatpu station, by virtue of this occupancy of Dr. Whitman, as they had a perfect right to do so, the American Board could not make a valid claim to The Dalles station, also, under the occupancy of Dr. Whitman. That gentleman could not occupy two stations at the same time 140 miles apart.

Occupancy is *actual* possession, *possessio pedis*, and not a constructive possession. Therefore, the deed of the American Board to the Methodist Society, on the 28th of February, 1859, conveyed nothing whatever.

POINTS OF LAW.

By the act of August 14, 1848, the title to the land *then occupied* as missionary stations was granted to the missionary societies to which the stations belonged.

The act does not, like the act of March 2, 1853, organizing Washington Territory, grant titles to land which had previously been so occupied.

All grants of this description (public grants) are strictly construed. Against the grantor, nothing passes but what is conveyed in clear and explicit language, and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed, they cannot be implied.

Dubuque, etc., R. R. Co. vs. Litchfield, 23 Howard, 88.

Leavenworth, etc., R. R. Co. vs. U. S., 92 U.S., 740.

If Congress had intended to grant to religious societies the missionary stations which had been occupied prior to August 14, 1848, but which were then unoccupied, doubtless that body would have expressed its intention in clear language, as was afterwards done in the "act to establish the Territorial Government of Washington," approved March 2, 1853.

10 Stat. at large, 173.

In the first section of the latter act, it is "*Provided further*, that the title to the land not exceeding 640 acres, now occupied as mission stations among the Indian tribes in said Territory, *or that may have been so occupied as mission stations prior to the passage of the act establishing the Territorial Government of Oregon*, together with the improvements," etc.

Appellant now asks the court to give the same construction to the act of August 14, 1848, as to the act of March 2, 1853.

In other words, appellant asks the court to confer a title by judicial legislation, and not according to the plain terms of the act of Congress.

If Congress had intended to extend the law, so as to include all missionary stations in Oregon which had been occupied prior to August 14, 1848, but not then occupied, doubtless it would have so provided in the act of 1853, when the subject was before Congress. But there was good reason for making the distinction in regard to the mission stations in Oregon and Washington Territories.

In Oregon the station at The Dalles was voluntarily abandoned, and without any reasonable apprehension of danger. In Washington, the missionaries were either slain by Indians at their posts of duty or they fled, to save their lives from real, not imaginary dangers. There was ample reason why Congress should favor the latter, and not the former. It is enough, however, to say a distinction was made in the legislation of Congress, and that the limited terms of the organic law of Oregon were not intended to be enlarged when the whole subject was before Congress, in 1853.

The donation land law of Oregon, approved September 27, 1850, provided that grants of land shall be made to settlers, or occupants of the public lands, "*now residing in said Territory*," etc.

It has been repeatedly held by the Land Department, and by the United States and the courts of Oregon, that where a settler had improved and cultivated a tract of land in Oregon, and was residing upon it at the time of his death, and died before the 27th of September, 1850, his children or heirs took no title to the land occupied by their father; and that any other person could take it as public land.

Ford vs. Kennedy, 1 Oregon, 168.
Moore vs. Fields, 1 Oregon, 317.
Lamb vs. Starr, 1 Deady, 359.
Fields vs. Squires, 1 Deady, 376.

Applying the same rule of construction to the grants made to missionary societies under the act of August 14, 1848, no grant was made of a station not then occupied.

The words of limitation in the donation law are *now residing*, and in the law relating to missionary societies, *now occupied*.

But while the appellant concedes that the tract of land claimed by it was not occupied as a missionary station on August 14, 1848, it claims that it had an equitable right to the land, because it once had a station there, and expended a large amount of money in erecting buildings and making improvements thereon.

With equal right might it be urged that where a settler on the public lands in Oregon had cultivated and improved a tract, and died upon it before the passage of the donation law, that his children had an equitable right to the donation of the land settled upon by their father.

The law in neither case provides for equities. But the appellant has no equitable rights, whatever, because the United States, having included the missionary buildings and other improvements within The Dalles Military Reservation, paid the missionary society of the M. E. Church $20,000 for the same, in pursuance of the act of Congress approved June 16, 1860.

12 Stat. at large, 44.

A Missionary Station, within the meaning of the term as used by Congress, was a place where instruction was imparted to the Indians, by means of teachers or ministers sent as missionaries to Oregon by some religious society. And the stations *belonged* to the religious society which had the instructors or teachers at the station, and who were imparting the instruction to the Indians. When it ceased to impart such instruction, it ceased to be a missionary station.

Like a military *station* or a stage *station*, it ceases to be such when abandoned or disused.

4 Otto, 219.

II.

Apart from any right or supposed right which the appellant may have had to the land upon which the mission buildings stood, and the improvement and cultivation of the land around those buildings, all of which was paid for by the United States, as before set forth, I contend that it never had any occupancy of the land embraced within the limits of the claim of Dalles City.

The land occupied by the Methodist Mission never extended north of a basaltic bluff, designated in the plat or map of Surveyor-General Chapman, fronting page 47 of the printed record, and the plat of the same officer fronting page 86. The land between this basaltic bluff and the Columbia river —and which is the land now in controversy in this suit.—was ,during all the time the missionary society was in full possession of the station from 1837 to 1847, occupied by the Indian villages, as a public landing and place of camping by voyageurs, immigrants and others.

See depositions of Nathan Olney, Elisha McDaniel and Edward Crate, printed record, pp. 56, 68, 69 and 70.

Instructions of Surveyor-General Chapman, No. 5, p. 99.

Opinion of Surveyor-General Chapman, printed record, p. 83.

The Indians would never have permitted the missionaries to take and *occupy* their villages and houses. And as a matter of fact it never was done. The claim to the land north of the bluff is a mere afterthought, made since the act of Congress was passed.

III.

If there was any grant made to the Methodist Missionary Society, it was a grant *in presenti*, and required no patent, and the first section of the act of August 14, 1848, did not authorize any survey of the land to be made, nor any patent to be issued.

Opinion of Attorney-General Bates.
11 Opinions of Attorney-General. 47
Patterson vs. Tatem, 3 Sawyer, 164.

Section 2447 of the United States Revised Statutes, under which the patent was issued, merely permits a patent to be issued, but does not require it to be done. "*It may be lawful to issue patents, etc.*"

11. Opinions of Attorney-General, 47.

The patent to the Missionary Society was issued without authority of law, because it was based upon a private survey made by Justin Chenoweth for the Missionary Society.

Printed Record, pp. 117, 118.

The act of December 22, 1854, U. S. Revenue Statutes, sec. 2447, authorizes a patent to be issued "upon the presentation to the Commissioner of the General Land Office, of the plats of survey thereof, *duly approved by the Surveyor-General* of the State or Territory, if the same be found to be correct by the Commissioner.

The Surveyor-General of Oregon, to whom the same was referred by the Commissioner, found that the Missionary Society never at any time occupied more than 87.78 acres of the tract now claimed by the appellant, and that the

land so occupied did not extend north of the bluff, all of which was paid for by the United States and included in the military reservation.

Opinion of Sur. Gen. Chapman, printed record, p. 83.
Plat or diagram facing p. 47, printed record.

The claim of the Missionary Society is based entirely upon the survey of Justin Chenoweth, made at the instance and request of Messrs. Roberts and Waller, in June, 1850, and a patent based upon such survey is a nullity.

Smith vs. the U. S., 10 Peters, 434.
U. S. vs. Lawton, 5 Howard, 10.
Boggs vs. Merced M. Co., 14 Cal., 359, 361.
LeCompte vs. U. S., 11 Howard, 127.

JAMES K. KELLY,
Attorney for Dalles City.

17-336 & 347

In the Supreme Court

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THE UNITED STATES.

OCTOBER TERM, 1882.

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APPEAL FROM THE CIRCUIT COURT

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MOTION TO DISMISS APPEALS.

BRIEF OF DEFENDANTS.

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These motions were based on the depositions of Victor Trevitt, N. H. Gates, James B. Crossen and John M. Marden which were filed in this court on the same day. Notice of the time and place of taking these depositions was served on John C. Cartwright one of Appellant's attorneys of record, so that he might appear and cross-examine the deponents if he should think proper.

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KELLY, WAIT AND HUMASON. — No. 207.

In this case the suit was for twenty-seven acres of land less two blocks.

See decree of Circuit Court printed record page 34.

By Trevitt's deposition filed with the motion to dismiss the appeal, it will be seen that each block in 300 feet by 255 with streets 60 feet wide. The area of the two blocks is a little over four and a half acres and this deducted from the 27 acres specified in the decree of the Circuit Court leaves twenty-two and a half acres the amount of land in controversy in their suit.

Neither of the witnesses who swear to the value of the property estimates it at more than $75 per acre, which would make the whole land worth $1,687.50. Admitting it to be worth $100 per acre the whole value would be only $2,250.

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In this case the property in controversey is 19 lots of ground in the Bluff addition to Dalles city.

(See decree of Circuit court printed Record page 33.)

The depositions of the witnesses testifying to the value of these lots, is that they are worth from $75 to $100 per lot. The utmost value of these lots is therefore less than $1,900.

At the time the citation was served on respondents the appellant was notified that the amount in controversy in his suit was not more than $2,000, and no evidence has been taken to show that it was greater. 21 Howard

(See printed record page 50.)

While conceding the fact that the amount in controversy in each of the cases is less than $5,000, the appellant, as I understand, claims the right of appeal to the Supreme Court, on the ground that the decision of the court in either of these cases will virtually settle the right to a much larger amount than $5,000, which property is in the same alleged grant to the appellant.

I contend that each case stands by itself, and without any relation whatever to lands or lots claimed by other persons included in this same alleged grant to the appellant.

Seaver vs. Bigelows, 5 Wallace, 208.
The Grace Girdler, 6 Wallace, 441.
The Rio Grande, 19 Wallace, 178.
The Connemara, 103 U. S. 754.

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One of defendants, and attorney for the other.

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